

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Off edavit

77-6168

To be argued by
GARY G. COOPER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6168

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross Appellant,

—against—

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,
Defendant-Appellant-Cross Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

FEB 15 1978

J. DANIEL FISKE, CLERK

SECOND CIRCUIT

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-6168

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross Appellant,

—against—

CONSOLIDATED EDISON COMPANY, *Defendant-Appellant-Cross Appellee.*
F NEW YORK, INC.,
Plaintiff-Appellee-Cross Appellant.

BRIEF FOR PLAINTIFF-APPELLEE

Preliminary Statement

This is an appeal by Consolidated Edison Company of New York, Inc., defendant-appellant ("defendant" and/or "Con Edison"), and a cross appeal by the United States, plaintiff-appellee ("plaintiff" and/or the "Government"), from the September 20, 1977 judgment of the United States District Court for the Southern District of New York, Lawrence W. Pierce, D.J. (A22-23).^{*} The judgment was entered upon findings of fact and conclusions of law contained in a July 19, 1977 opinion and order which was filed pursuant to Rule 52(a) Fed. R. Civ. P. (A22-75). Upon completion of a two week trial, the Court found that the defendant, Con Edison, by its statements and conduct was estopped from denying a contract to reimburse the Government for the costs

^{*} References to "A" are to the Joint Appendix filed by defendant.

it incurred in making electric power available to Con Edison during Con Edison's power emergency in the summer of 1970.* Furthermore, the Court found that the defendant was liable to plaintiff under the doctrine of "emergency assistance." Finally, the Court awarded plaintiff \$1,576,595 in damages representing the actual loss suffered by the Government as a result of its assistance to Con Edison.

Issues Presented

1. Whether the District Court erred in finding that Con Edison was estopped from denying the existence of a contract.
2. Whether the District Court erred in finding that Con Edison was liable to the Government under the doctrine of "emergency assistance".
3. Whether the District Court erred in dismissing the Government's contract claim on the ground that the agreement was barred by the Statute of Frauds.
4. Whether the Court's findings on damages are clearly erroneous.

Statement of the Case

This action is based upon an agreement by the then Atomic Energy Commission ("AEC"), an agency of the United States,** to relinquish its contractual right to

* The Court denied the Government's alternate contract claim on the ground that it is barred by the statute of frauds. (A22-23). The District Court's action in dismissing this claim is the subject of the Government's cross-appeal.

** The AEC was replaced pursuant to the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 *et seq.*, by two new agencies. The Energy Research and Development Administration assumed

purchase 200 megawatts ("MW") of electrical power so that this power could be made available to Con Edison, a private, profit-making utility serving the New York metropolitan area, which was facing a potentially catastrophic electrical power emergency in the summer of 1970.

In a comprehensive, 49 page opinion, dated July 19, 1977, the District Court set forth its findings of fact and conclusions of law regarding that emergency and the Government's agreement to provide assistance. (Op., A24-75). The following represents a summary of the facts as determined by the Court and as supported by the testimonial and documentary evidence presented during the course of the trial.

Statement of Facts

A. May 5 Statement

In the spring of 1970 the Government became concerned that the nation's public utilities might be unable to satisfy public demand for electrical power during the coming summer (Op., A25-26). In response to this concern, the Executive Office of the President established an inter-agency task force comprised of representatives from many federal agencies under the auspices of the Office of Emergency Preparedness ("OEP") to consider the means by which each of the federal agencies could assist in identifying critical power shortages and what actions each could take to prevent power failures and/or brownouts (Op., A26).

For its part, the AEC explored the possibility of reducing its power consumption at its three gaseous diffusion plants located at Oak Ridge, Tennessee, Ports-

the AEC's programmatic responsibilities, including the operation of the AEC's research and production facilities, and the Nuclear Regulatory Commission assumed the AEC's regulatory functions.

mouth, Ohio and Paducah, Kentucky, where it enriches uranium (Sullivan Direct, A542). These plants consume large amounts of electrical power and in 1970 the AEC had written contracts with the Tennessee Valley Authority ("TVA"), the Ohio Valley Electric Corp. ("OVEC") and Electric Energy Inc. ("EEI") to supply these plants with 2000 MW of electrical power (Op., A27-28). After studying the problem and considering the impact of a reduction on the operations of its gaseous diffusion plants, the AEC determined that it would be possible to reduce consumption of power at these plants by up to 450 MW if there were critical shortages of electricity or fuel in the commercial sector (Quinn Direct, A80).^{*} It was never the intention of the AEC to automatically curtail production or relinquish its contractual rights to power in implementing this policy, nor relinquish more than 450 MW. Rather, such actions were intended to depend upon whether there developed a real need for the power, whether the power could be transmitted to where it was needed and whether it was feasible for the AEC plants to reduce their consumption at the time (Quinn Direct, A80).

On May 5, 1970, OEP issued a statement of ways the Government intended to assist utilities in the event of critical electrical power shortages during that summer (Op., A26). As part of that statement, which was disseminated in the form of a press release, it was announced that should the need arise, the AEC would make arrangements to curtail production at its gaseous diffusion plants thereby releasing electrical and other energy for use by utilities in meeting peak demands of the consuming public (Quinn Direct, A81). The statement read in part as follows:

^{*} George Quinn, who was called as a witness by the Government, was the Acting Assistant General Manager of the Atomic Energy Commission in 1970 charged with responsibility for the Commission's production program.

The AEC will make arrangements to curtail production this summer at the AEC gaseous diffusion plants, which use large amounts of electricity. This could release coal supplies and generating capacity which could be used to assist in meeting fuel shortages and peak loads of the consuming public in parts of the interconnected system. The diffusion plants are being used, in part, to produce enriched uranium for future use in nuclear power plants (May 5 Statement, PX-4, A1508-10).

As the District Court found, this statement was simply a general expression of AEC policy to relinquish an amount of power in the event of critical power shortages (Op., A27; Quinn Direct, A82). Further, as the District Court found in rejecting Con Edison's contention to the contrary, it was *not* a commitment binding the Government to undertake emergency assistance without the ability to seek reimbursement for its costs (Op., A27).

B. The AEC's Gaseous Diffusion Facilities

As noted above, in 1970 the AEC operated three gaseous diffusion facilities.* *Supra*, pp. 3-4. The facilities were constructed to enrich natural uranium ore for use in atomic energy programs. At the inception of the enrichment program the enriched uranium was used primarily for military purposes, with a relatively small portion of the plants' output devoted to civilian programs (Quinn Cross, A153).

By 1970 the focus of production had shifted away from military programs and toward civilian nuclear generating reactors (*Id.*). The enrichment process, while fairly complicated, can be summarized by reference to its

* The facilities were operated by private contractors for the Government (Sullivan Direct, A542-43).

essential stages. Natural uranium ore is converted into a gaseous state; the gas is then passed through some 1,200 to 1,300 processing stages in a series ("cascades") to achieve the desired concentration of isotope U-235 (Sullivan Direct, A552-53). Since each stage only achieves a slight increase in the concentration of the isotope U-235, large amounts of electrical power are required to achieve the desired enrichment (Op., A27; Sullivan Direct, A552). The end product of this process—enriched uranium—is measured in separate work units ("SWU") which are calculated by measurement of the assay level of the enriched uranium at various stages in the cascade process (Op., A29).

When power supplies to these facilities are reduced certain production losses are incurred. There are changes in the efficiency of the use of power which result from increasing or decreasing power (Quinn Cross, A226). Specifically, there are losses occasioned by inefficient mixtures during the continuing enrichment process while power is being increased or decreased (*Id.*). Moreover, the delicate equipment used in the enrichment process experiences inordinate stress, resulting in breakdowns and/or wear when power is severely curtailed or increased at these facilities (Sullivan Direct, A580-81).

Apart from these considerations of efficient utilization of power at given levels and the impact of severe fluctuations in power, the AEC like any other producer also has "fixed costs" and "added factor costs" in the daily operation of its facilities (Op., A29, A47-49; *see infra*, pp. 30-31). The distinction between efficiency losses and production losses—which are calculated by reference to fixed costs and added factor costs—has been muddled by defendant. Review of the testimony of George Quinn, however, makes the distinction clear. (Quinn Cross, A225-26, and Re-direct, A514-15). As Quinn explained the AEC had reduced power in January, 1970 for the benefit of TVA and, as a result, had imposed a "power premium"

charge upon TVA (Quinn Cross, A225). This reduction had lasted for 12 days (DX-D-8, A2321-22), at the end of which and for a period of 4 to 5 months thereafter, the AEC required TVA to return 10.4% more power to the AEC in order to compensate it for the loss in efficiency and so that the AEC would be able to produce an amount of SWUs equal to the amount that would have been made if there had not been any interruption of power at the plants (Quinn Cross, A225-26; DX-D-8, A2323-22). Quinn went on to explain, under questioning from counsel for Con Edison, that the AEC had not, prior to July 1970, considered the impact of an extended reduction of power upon loss of production—and therefore the effect on fixed costs and added factor costs—precisely because the power premium had been imposed thereby preventing a loss in production (Quinn Cross, A225-26 and Redirect, A514-15).

Under the earlier reduction [January, 1970] where production would be maintained the same and costs maintained the same, there would be no increase in production costs over that entire fiscal year. That was the situation with respect to the reduction in January for TVA.

The reductions that were made pursuant to the policy announced on May 5th were reductions that actually resulted in a loss in production and different efficiency factors come into play in a situation where there is a loss in production (Quinn Cross, A225-26. See Quinn Redirect, A514-15).*

* The defendant, in its brief, refers to the losses experienced by the AEC in January, 1970 as "the same kinds of losses upon which the surcharge to Con Edison allegedly is based" (Br. 12). This conclusion is not only at odds with the testimony but ignores the District Court's conclusion that "there is no reason to conclude that the January reduction was comparable to the reduction at issue here" (Op., A73 n.1).

C. The 450 MW Reduction

Pursuant to the Government's May 5 statement, in the middle of June, 1970, TVA, OVEC and EEI formally requested the AEC to modify its power contracts with them to provide for the relinquishment of the AEC's contractual right to 450 MW during that summer (Quinn Direct, A84). As noted above, this was the total amount of MWs which the AEC contemplated releasing pursuant to the May 5 statement. *Supra*, p. 4. The power was to be used for the benefit of TVA's, OVEC's, and EEI's other customers and neighboring utilities which were suffering under critical shortages (PX-5, A1521-33). The AEC was reluctant to do so (Op., A28), and before it would agree to release this power, it consulted with the Federal Power Commission ("FPC") which, unlike the AEC, was in a position to know whether the power was, in fact, needed (Quinn Direct, A84).^{*} The FPC responded by letter dated June 25, 1970 that the utilities should have reserve margins of electrical power amounting to 15 to 20 percent of expected peak demand and that many utilities were well below those levels (Quinn Direct, A85; PX-5, A1522-26). The FPC therefore advised the AEC that there was, indeed, a critical shortage and that the power should be released to those suppliers. As a result, at the end of June, the AEC entered into written modifications of its contracts with TVA, OVEC and EEI providing for the temporary reduction, by 450 MW, of the amount of power the AEC could demand commencing July 1 and 2, 1970 (Quinn Direct, A86-87; PX-6 through PX-9, A1534-41). Con Edison neither asked for nor received any of this power.^{**}

^{*} The AEC was not in a position to assess claims of critical shortages (Quinn Cross, A215). Moreover, it was concerned that this offer of power was subject to abuse; hence, the AEC sought the advice of the FPC (Quinn Cross, A216, A222).

^{**} A study enclosed with the letter indicated that Con Edison had reserves of 14.5 percent (PX-5, A1521-33).

It was not until after the AEC had released the 450 MW that it recognized the full extent of the economic effects of the power reduction on the AEC (Op., A29). With the reduction in power, the AEC could not maintain the same level of production of enriched uranium. Nonetheless, its fixed costs remained the same thereby increasing the cost of each SWU produced in the AEC's three gaseous diffusion plants (Op., A29; Quinn Direct, A88; Quinn Cross, A225-26, and Redirect, A514-16). Thus, in early July, 1970 the AEC began to actively consider imposition of a surcharge for any subsequent reductions in power for the benefit of public utilities (Op., A29; Quinn Direct, A88, A91).

D. Con Edison's Emergency

Prior to the summer of 1970, Con Edison purchased as much available power from other utilities as it could "line up" (Luce * Cross, A844; Schwartz Cross, A1096; PX48, A1712-13). Con Edison knew it had insufficient power to satisfy its own reserve requirements in the event of heavy demand during the summer months of 1970 (Luce Cross, A843). In the spring of 1970 a vibration problem had developed in the stator of Con Edison's Ravenswood No. 3 generator—its largest, generating 1000 MW (Luce Direct, A799). At that time, Con Edison ordered a new stator, anticipating delivery approximately 18 months later (Con Ed 1970 Annual Report, PX-47, A1685). In the interim, the operational reliability of this unit was, thus, seriously in question. In addition, on May 20, 1970 Con Edison lost its smaller Indian Point unit, a nuclear power plant generating 260 MW (Op., A29; PX-47, A1685). The two units accounted for approximately 14% of Con Edison's electrical generating capacity (PX-47, A1683).

Anticipating problems, Con Edison also developed an emergency plan, containing fifteen or twenty steps to be

* Charles Luce, Chairman of the Board of Con Edison.

taken in the event of critical power shortages during the summer of 1970 (Luce Cross, A845). The plan began with minor steps, progressing to voltage reductions and finally it envisioned "loading shedding" (intentional disconnection of electricity to designated areas) (*Id.*). The plan was intended to be activated if Con Edison were unable to purchase needed power from other sources in order to meet deficiencies (*Id.*, A846). In such emergency circumstances, Luce stated on cross-examination, there was no limitation on the amount Con Edison would be willing to spend for power (Luce Cross, A847-49; Schwartz Direct, A989-90; Op., A32).

1. Tuesday and Wednesday, July 21 and 22, 1970

It is with this backdrop that, on the evening of July 21, 1970, Con Edison confronted a major power crisis when Ravenswood No. 3, its 1000 MW plant commonly known as "Big Allis", completely failed and was shut down (Op., A27). Indeed, Luce testified that the failure of Ravenswood No. 3 represented the most severe emergency faced by Con Edison during his ten years with the utility (Luce Cross, A850; Op., A29-30). Arthur Hauspurg, currently the President and Chief Operating Officer of Con Edison, stated that the situation was so unusual in length and circumstances that it defied industry definitions of emergency; it was, in essence, a catastrophe (Hauspurg Direct, A942).

The loss of Ravenswood meant the loss of substantially all of Con Edison's reserve capacity (Luce Cross, A850). It was essential that Con Edison replace the reserves as rapidly as possible, since a hot spell had been forecast for the following Monday, July 27, 1970 (Luce Cross, A850-51). The "pool" arrangement which Con Edison had with other New York and adjacent utilities * was

* Con Edison was a party to a "pool" agreement with a number of other New York State utilities under which any member of the pool could purchase from other members several different clas-

[Footnote continued on following page]

clearly insufficient to handle this catastrophic emergency, and Con Edison immediately began looking for an alternate source of long-term supplemental power (Op. A30).

Luce met with his management staff on Wednesday, July 22, 1970 "to discuss and lay out a program to meet the emergency" (Luce Direct, A800). At that time, Luce was advised that Big Allis would be out of service for the rest of the summer and beyond (*Id.*). Arthur Hauspurg, then Vice President of Con Edison, was responsible for finding alternate power to alleviate the crisis which had developed (Luce Cross, A852). At best, the atmosphere at Con Edison was tense and hectic on July 22, 1970, as senior company officials attempted to replace reserves with power which its traditional sources were unable to provide (Luce Cross, A851).

2. Thursday, July 23, 1970

On July 23 Luce placed a telephone call to David Freeman of the Office of Scientific Advisor to the Presi-

sifications of power (Hauspurg Direct, A932). "Economy" power could be purchased on an hour to hour basis from any utility within the pool who happened to be operating the most efficient plant at any given period (*Id.*, A933). This power was priced in accordance with the savings effected through the use of the lower cost power, with the recipient and the donor sharing in the savings (*Id.*). Members of the pool agreement were also able to purchase "supplemental" power from other members to offset any deficiencies in their systems. This power was uniformly priced throughout the state and was pegged at the cost of generation (*Id.*, A935-36). Finally, "emergency" power could be purchased to avert crisis conditions which developed within a system (*Id.*, A936). However, such "emergency" power could only be purchased "for a few hours until you can make some other arrangement" (*Id.*, A942). Clearly, given the magnitude of the crisis facing Con Edison—which was expected to last "for the rest of summer and longer" (Luce Direct, A800)—the "emergency" power under the pooling arrangement was not available (Hauspurg Direct, A942).

dent (Luce Direct, A802). The day before, after hearing of the Ravenswood failure, Freeman had called Con Edison to advise the company of the Government's May 5 statement (Op., A31; Luce Direct, A803). As the District Court found (Op., A31), during the July 23 telephone conversation Freeman informed Luce that although the AEC had already made one power reduction, he believed that a further power release to Con Edison might still be possible (*See* Luce Direct, A803, and Cross, A857). Luce indicated that Con Edison wanted the power and Freeman directed him to get in touch with George Quinn of the AEC to make specific arrangements and to determine how much power might be available (Op., A31; Luce Direct, A803-04). In short, Freeman told him to "get the details from Mr. Quinn" (Luce Cross, A858). In reply, Luce advised Freeman that he would do so (Luce Direct, A802).*

Subsequently, Freeman called Quinn to inform him of the crisis in New York and to further advise him that the AEC would be contacted by a representative of Con Edison to discuss the feasibility of further power re-

* Although at trial Luce attempted to characterize this and the prior conversation with Freeman as an "offer" of power by the Government and an "acceptance" of that offer by Con Edison (Luce Cross, A857), the District Court found that these conversations "were only preliminary discussions" (Op., A31). The District Court's conclusion concerning the tentative nature of this conversation is amply supported by the record. Indeed, in a summary of the July 23, 1970 conversation with Freeman, Luce stated that Freeman had advised him "that AEC power *might* be made available to Con Edison . . ." (PX 50, A 1806 (emphasis added); Luce Cross, A 859). To the same effect, Luce also testified at a pretrial deposition that Freeman stated only that the AEC "*might release*" additional power (Luce Cross, A 862). In that conversation, Freeman did not tell Luce where the power was or whether it could be delivered (Luce Cross, A859-60), or that the power could be transmitted to New York (*Id.*, A860). Nor did Freeman tell Luce whether there would be any charges relating to the power (*Id.*, A861).

ductions by the AEC in order to assist Con Edison (Op., A31; Quinn Direct, A89). Quinn then spoke with a staff member in the AEC division of production who indicated that the possibility of further power reductions by the AEC was already under study and that it was the staff's view that a surcharge should be imposed with respect to any such further reduction (Quinn Cross, A262). Quinn reported these events to E. H. Bloch, the AEC Acting General Manager and Quinn's superior, and informed him that the staff had recommended a surcharge should power be released to Con Edison (Op., A31; Quinn Direct, A263).

In subsequent telephone conversations on July 23, Quinn informed Freeman and Kreigsman, an assistant on the White House Staff, that the AEC intended to recover its costs from Con Edison and apply a surcharge for the release of power (Op., A34; Quinn Cross, A273, A280).^{*} Although Quinn did not recall any response from Freeman upon informing him of the AEC's intention to recover its costs, he specifically recalled that Kreigsman found the surcharge to be acceptable (Quinn Cross, A280). During this discussion Kreigsman informed Quinn of the substance of a press release which the White House intended to issue concerning the reduction of power for the benefit of Con Edison (*Id.*, A281). Kreigsman also told Quinn that the President requested that the power be made

^{*} Con Edison is correct in noting in its brief (Br. 16n*) that during a pretrial deposition, Quinn did not recall telling Freeman of the surcharge. Con Edison has failed, however, to note that subsequent to that deposition Quinn reviewed contemporaneous notes of that conversation which refreshed his recollection that he had, indeed, informed Freeman of the intended surcharge (Quinn Cross, A 278). The District Court credited Quinn's testimony and found that the White House had been informed on July 23, 1970 of the AEC's intent to seek a surcharge (Op., A73 n.4).

available to Con Edison if it were needed (*Id.*, A281, A285).*

Mid morning on July 23, Luce also telephoned Fred Chambers, an official of TVA,** to inquire about the availability of power from TVA and to determine what TVA knew of the AEC's ability to reduce further its power from TVA (Chambers Direct, A389). Chambers informed Luce that he was not sure that the TVA would be able to aid Con Edison; he further stated that although he could not speak for the AEC, he knew that the AEC's earlier power reduction (*i.e.*, the 450 MW reduction in early July) was creating operational problems and that he believed that further reductions would be difficult to achieve (Chambers Direct, A389-90). Chambers nonetheless indicated that he would see what could be done (*Id.*, A390).

Chambers then spoke with his staff to determine whether TVA could assist and he called Sam Saperie, manager of the AEC's gaseous diffusion plant at Oak Ridge (*Id.*, A391). Saperie advised Chambers that another reduction by the AEC would not be feasible (*Id.*). One or two hours later Saperie called Chambers and stated that the AEC was receiving pressure to assist Con Edison but that it nevertheless remained concerned that a further reduction would cause operational and

* Contrary to what is implied throughout Con Edison's brief, it can not be concluded that the AEC acted contrary to the White House's direction "to make power available" to Con Edison by seeking a surcharge for the power. As noted above, and found by the District Court (Op., A34), the White House had been informed of the AEC's intention to collect a surcharge. Moreover, Con Edison's subsequent attempts to have the White House intervene and overrule the AEC on the surcharge issue were completely rebuffed by the White House (*see infra*, p. 25).

** Chambers who was the assistant manager of power for TVA in 1970 was called as a witness by the Government.

ity problems (*Id.*). Saperie further stated that the AEC's efficiency losses would be considerable in the event of a further power reduction, indicating, in response to Chambers' questioning, that the magnitude of the loss would be in the neighborhood of 3 to 7 mills per kilowatt hour (*Id.*, A391-92). Saperie went on to state that the actual computation of this cost would take some time and that his staff had begun working on it (*Id.*, A392).

Chambers called back Luce to inform him that TVA could not assist and that he had spoken to Saperie who was looking into further reductions at Oak Ridge and Puducah (*Id.*, A393). Chambers also advised Luce that the AEC power would be very expensive because of the AEC's substantial efficiency factor (*Id.*). Although Chambers indicated that the AEC was still computing the charge, he estimated for Luce that, including the AEC's efficiency factor,* the power would cost Con Edison 12 to 14 mills PKH (Op., A33; Chambers Direct, A393).** In reply, Luce stated that "this is not a time to be discussing cost. We are desperate up here" (Chambers Direct, A393; Op., A33).***

* The District Court found that Chambers advised Luce that the efficiency charge was estimated at that time to be from 3 to 7 mills per kilowatt hour ("PKH") (Op., A33).

** Con Edison's attempt in its brief (Br. 15n*) to attack the accuracy and credibility of Chambers' testimony concerning these conversations with Luce, and to rely on Luce's recollection instead, must fail. As the District Court specifically found, "Chambers, a relatively disinterested witness, had a more accurate recollection of the conversations" than Luce (Op., A 73 n.3).

We further wish to note that although Con Edison initially stated in its brief that it would identify those instances when its statement of the facts differed from a finding of fact by the District Court (Br. 1 n*), it has failed to do so: for example, once in connection with the Chambers-Luce conversations, and also in its comparison of the January power reduction with the July power reduction for Con Edison, *supra*, p. 7n*.

*** The District Court found that at the time of this discussion Luce was primarily concerned with getting power rather than with

[Footnote continued on following page]

Later that day, Chambers also spoke with Hauspurg, confirming TVA's ability to assist in transmission of AEC power to New York (Op., A33). Con Edison's president, Louis Roddis, who was kept advised of the developing situation by Luce (Luce Direct, A812), called Quinn to inform him that Con Edison was interested in the availability of the AEC's power (Op., A33).^{*} Quinn replied that the AEC had to work out appropriate arrangements with its supplier utilities and that he would call back Roddis. (Op., A33; Quinn Direct, A90). Quinn did not mention an intended surcharge, but as the District Court found, this conversation was another preliminary discussion (Op., A33-34).

After these conversations, and late on the afternoon of July 23, 1970, the White House issued a press release at its afternoon press briefing, which read as follows:

the cost of the power to Con Edison (Op., A32). This conclusion finds support not only in Luce's comment on the anticipated expense of the AEC power but also in Con Edison's approach to potential TVA power. In his discussion with Chambers, Luce asked about reactivating an obsolete TVA steam generation plant, Watts Bar (Chambers Cross, A396). In response to Luce's inquiry, Chambers stated that the costs of power generated through this plant combined with the costs of starting it up could be quite expensive (*Id.*, A396-98). Expense notwithstanding, Chambers was reminded, on cross-examination by Con Edison's counsel, that Luce and Hauspurg, on four separate occasions during July 23 and 24, 1970, contacted him with respect to starting up this expensive source of power (*Id.*, A397-99). The idea was mutually abandoned by Saturday, July 25, 1970 (*Id.*, A399-400). Indeed, by this time Con Edison had made arrangements with the AEC for power.

^{*} By this time, Roddis had discovered that because of the failure of a generator in Western Pennsylvania—fortuitous for Con Edison—it would be possible to transmit power from TVA to New York. (Roddis Direct, A899-900); absent this failure it would have been impossible to do so (*Id.*).

The President announced today that the Atomic Energy Commission will take immediate action to make available several hundred megawatts of power to the Consolidated Edison Company serving New York City.

This action is being taken to help relieve the critical power shortage in New York City created by the failure of its largest generating unit on July 21.

The release of this power is pursuant to the contingency plans previously developed and announced by the Office of Emergency Preparedness on May 5.

The power would be available by reducing the use of electricity at the AEC's gaseous diffusion plants. The Consolidated Edison Company is proceeding with the necessary arrangements with the other utility companies involved and the AEC.

It is expected that the power will be transmitted to New York over the interconnected grid system of the utilities in the Eastern United States. (A2064-65).*

Luce did not know of this announcement until July 24 when he read of it in the newspaper and he did not see the full text of the announcement until the following week (Luce Cross, A814-15).

3. Friday, July 24, 1970

On July 24, Quinn called back Roddis and in his absence spoke with Luce (Quinn Direct, A92). Quinn

* Again, the District Court made a specific finding that this press release "did not constitute an agreement" between the Government and Con Edison, it was "no more than it purported to be—a press release" (Op., A35).

advised Luce that, although the AEC was reluctant to further reduce its power consumption (Op., A36; Luce Direct, A818), if Con Edison requested a reduction in power and it could be transmitted to New York, the AEC would reduce its power by 200 MW so that TVA and OVEC could make it available to Con Edison (*Id.*). It is undisputed that Quinn informed Luce that Con Edison would have to pay a surcharge to cover the costs the AEC would incur due to the reduction of power (*Id.*, A92-93; Luce Direct, A819). Luce replied that Con Edison was still attempting to determine if transmission could be arranged and that he was not yet in a position to unqualifiedly request the power (Luce Direct, A820). He further stated that if the power could be transmitted to New York, Con Edison would need it for the remainder of the summer (*Id.*, A821).

Apparently unconcerned with the surcharge, Luce also stated during this conversation that Con Edison would pay whatever surcharge the recipients of the 450 MW had paid (Op., A36; Luce Direct, A819). In this latter connection, Luce conceded on cross-examination at trial that he was merely expressing Con Edison's willingness to pay a surcharge (Luce Cross, A864). Quinn did not inform Luce that the recipients of the 450 MW had not paid a surcharge (Op., A36-37). He responded by telling Luce that the reduction for Con Edison would result in a greater incremental cost than had the prior reduction of 450 MW (Op., A37; Luce Cross, A863, A865). Quinn went on to state that he could not, at that time, estimate the amount of the surcharge because the actual costs and losses were under study (Op., A37; Quinn Direct, A92). Luce understood, however, that Quinn was talking about costs increasing as a result of less production (Luce Cross, A870). Indeed, in his prior conversation with Chambers, *supra* pp. 14-16, Luce had discussed the losses that the AEC would incur and had been informed

that the AEC's efficiency factor was estimated to be approximately 3 to 7 mills PHK and that the total cost of the power would be from 12 to 14 mills PHK (Op., A33, A54). Hence, Luce was fully aware on July 24, 1970 of the kinds of costs involved and the order of magnitude of those costs. The conversation ended with Quinn advising Luce that if Con Edison decided to take the power, it should make arrangements with TVA and OVEC because of the nature of the supply contracts between AEC and these suppliers (Luce Direct, A82, and Cross A869-70).

On the same day, AEC Acting General Manager Bloch sent a memorandum to AEC Chairman Seaborg and the Commissioners of the AEC advising them of the intended power reduction and surcharge (Op., A37; Quinn Direct, A329; DX-T-3, A2068). The memorandum reads, in pertinent part:

"The Oak Ridge Operations Office has been authorized to proceed to make available up to 200 MW as it may be needed by Consolidated Edison and as arrangements can be made with our power suppliers and the interconnected utilities for transmission of this power to the New York area. In agreements effecting such reductions, provisions will be included to recover from the utilities involved AEC costs and losses which result from the reductions." (DX-T-3, A2068).

As the District Court found, Quinn did not directly inform Con Edison of the amount of the surcharge since he had already told Luce that the surcharge, which was still being calculated, would reflect the AEC's added costs, and had advised him to begin negotiating with the supplier utilities (Op., A38). Further, the District Court found that the AEC intended to collect the surcharge through these suppliers utilities (*Id.*). In short, the District Court concluded that given these facts, Quinn did not directly advise Con Edison of the amount of surcharge after the release of the power because "he saw no need

to do so" (*Id.*; Quinn Direct, A99-100).^{*} Indeed, Con Edison followed Quinn's instructions and immediately began dealing with the supplier utilities for the transfer of power which was completed on the morning of Monday July 27, 1970 (Op., A38-39). Consistent with this, Con Edison did not again contact the AEC to determine the amount of the surcharge (Op., A38).^{**}

4. Monday, July 27, 1970 and Con Edison's Receipt of 200 MW of Power

The AEC began to reduce its power consumption at 12:01 a.m. Monday, July 27, 1970; by 7:00 a.m. on the same day the diffusion plants had reduced consumption by 200 MW (Quinn Direct, A105; Op., A39). The power was transferred from one system to another, each system being billed in the chain, until it reached Con Edison. As the District Court noted, "assured of adequate reserves to meet the energy needed of the metropolitan New York area, Con Edison had weathered the crisis" (Op., A39).

^{*} The District Court specifically rejected Con Edison's attempt to characterize the AEC's actions as "underhanded dealing, or... ungentlemanly behavior" (Op., A38). In this regard, the evidence suggests that Luce understood that the surcharge would be reflected in modifications of the AEC's contracts with the supplier utilities and that it would be collected through the billing chain. In his notes of the July 24 conversation with Quinn, Luce indicated as follows: "Price [undecipherable] production losses—deal thru K's—" (PX-49, A1804; Luce Cross, A869-70).

^{**} In light of Chambers' discussion on July 23, 1970 with Luce informing him that the AEC's power would likely cost Con Edison 12 to 14 mills PKH—including 3 to 7 mills PKH for an efficiency factor (*supra*, pp. 14-15)—and contrary to Con Edison's argument (Br. 20), it is inconceivable that Con Edison did not contact the AEC about the amount of the surcharge simply because an official of another utility had indicated that the AEC had imposed a 10%-20% surcharge on the previous release of power. If anything, the obvious substantial conflict would have encouraged Con Edison to inquire further of the AEC to determine the correct amount.

Con Edison had, indeed, weathered a major crisis. The full magnitude of the crisis and the importance of the AEC's release of 200 MW of power was grudgingly described by Bertram Schwartz, then Assistant Vice-President and now Senior Vice-President of Con Edison (Op., A39). The 200 MW supplied to Con Edison by the AEC represented three percent of Con Edison's overall peak load requirements (*Id.*). This simple percentage fails, however, to convey the critical importance of this power on Con Edison's day-to-day operations during the balance of the summer and through the end of September. Even with the additional 200 MW Con Edison was forced to reduce voltage three percent on fourteen separate days * during the balance of the summer of 1970 (Op., A39; PX-48-B, A1795-96; Schwartz Cross, A1110). Further, Con Edison had to reduce voltage by five percent on eighteen other occasions during this period (*Id.*).** Since the 200 MW released by the AEC equalled three percent of Con Edison's peak load requirements (Schwartz Cross, A1115; Op., A39), the absence of the 200 MW coupled with an already existing five percent reduction would equal an eight percent reduction, rendering it likely, as the District Court found, that on at least some of those eighteen occasions Con Edison would have been required to shed load (Op., A40).*** Indeed, Con Edison

* In fact, Con Edison reduced voltage by three percent on 22 occasions on these fourteen days (PX-48-B, A1795-96).

** On six days between July 27 and September 28, 1970 Con Edison's reserve capacity was considerably lower than 200 MW (PX-48-B, A17194). Thus, on at least six other days, and perhaps more, Con Edison would have had no reserve capacity absent the power released by the AEC (Op., A40; PX-48-B, A1794); it is also likely that absent this power, there would have been more voltage reductions than actually occurred (Schwartz Cross, A1114-15).

*** A voltage reduction of eight percent or more which does not restore a deficiency in Con Edison's power reserves requires "load shedding"—disconnecting customers (Op., A39-40; Schwartz Cross, A1108).

did reduce voltage by eight percent on three different days during this period (PX-48-B, A1795-96), and on September 22, 1970 it was required to shed load (Schwartz Cross, A1110-11).

While Con Edison devotes a section of its brief to the proposition that it does not have a legal obligation to supply its service area, the simple fact is that, as Schwartz admitted, it was Con Edison's duty to purchase the 200 MW in order to properly serve its customers (Schwartz Direct, A990, A995) and, as Luce stated, Con Edison is "held responsible for supplying energy to New York City" (Luce Cross, A853; Op., A40).

5. Calculation of the Surcharge and Subsequent Events

On Tuesday, July 28, 1970 the controller's office of the AEC calculated a surcharge of 5.41 mills, or .0541 cents PKH on the power released to Con Edison (Quinn Direct, A100, and Cross, A333; PX-13, A1544). Quinn reviewed this calculation and discussed it with his supervisor, Bloch, who approved it (Quinn Redirect, A520).^{*} On July 29, 1970, Quinn directed officials at the Oak Ridge diffusion facility to initiate contract modifications with the AEC's supplier utilities which would incorporate this 5.41 mills PKH surcharge (Op., A43; Quinn Direct, A102-3; PX-14, A1545). On or about August 3, 1970 the AEC executed the formal contract modifications with TVA and OVEC under which the AEC had released, beginning on July 27, 1970 and for the benefit of Con Edison, its rights to 200 MW of power for the remainder of the summer (Op., A43; PX-15 through PX-17, A1546-52). These agreements (PX-15 through PX-17) provide for the utilities to arrange to collect the 5.41 mills PKH

^{*}Quinn also testified that the AEC Commissioners did not have to approve the amount of the surcharge (*Id.*).

surcharge from Con Edison through the billing chain; Con Edison was not specifically informed of the terms of these modifications (Op., A43). See *supra*, pp. 19-20.

According to the testimony of Louis Roddis, on August 6, 1970 Con Edison first learned that the cost of the AEC power was approximately 12 mills PKH, including the 5.41 mills PKH surcharge (Roddis Direct, A903; DX-7, A2286). Upon being informed of the size of these charges, Luce objected* and directed Roddis to determine the amount of the surcharge paid by the recipients of the prior 450 MW reduction (Luce Direct, A829). Roddis learned that the recipients of the prior power reduction had not paid any surcharge to the AEC (Roddis Direct, A904).

Roddis then telephoned Quinn to ask whether this 5.41 mills PKH surcharge had the backing of the AEC Commissioners (*Id.*). Roddis also suggested that such a surcharge might cause political embarrassment to the AEC and to the White House (Op., A44; Quinn Direct, A106-7; Roddis Direct, A906). At no time, however, did Roddis state that Con Edison was going to refuse to take any more AEC power (Op., A44; Roddis Direct A905). Rather, in this or a subsequent conversation, Roddis requested that a representative of Con Edison be permitted to meet with the AEC to review the factual basis for the surcharge (Roddis Direct, A906-07; Quinn Direct, A109).** In addition, Roddis inquired if this surcharge could be handled as an excess cost of the uranium that the AEC was enriching for Con Edison "without arguing

* It should, however, be noted that the total cost of this power and the AEC surcharge are both within the range of estimates made by Chambers to Luce during their July 23, 1970 conversations (*supra*, pp. 15, 16), and to which Luce responded that "this is not a time to be discussing cost. We are desperate up here" (Chambers Direct, A393; Op., A33).

** Quinn agreed to this request and arrangements were made for Betram Schwartz of Con Edison to meet with the AEC on August 10, 1970 (Roddis Direct, A910; Quinn Direct, A109).

the amount" of the surcharge (Roddiss Direct, A910; Quinn Direct, A108). Quinn replied that this would not be possible (Roddiss Direct, A910).

On August 10, 1970, as previously planned, Bertram Schwartz of Con Edison met with Quinn to discuss the calculations which formed the data base for the 5.41 mills PKH surcharge (Quinn Direct, A109-11, and Cross, A438-41).^{*} Schwartz suggested different means of calculating the surcharge and stated Con Edison's concern that the surcharge, in its present form, would not allow the utility to pass the added costs along to its customers (Op., A45; Quinn Direct, A109-10, and Cross, A438-39). Schwartz also informed Quinn that the AEC's calculation (PX-13, A1544) was based upon the incorrect assumption that the 200 MW was needed for 90 days, when in fact Con Edison only needed it for 66 days; the calculation was subsequently corrected in accordance with Schwartz's suggestion (Op., A74 n.10). When Schwartz asked why AEC had imposed no surcharge upon the recipients of the prior 450 MW reduction, Quinn told him that it was an oversight and that the AEC was seeking to renegotiate the agreements with the recipients of the prior reduction to include a surcharge (Quinn Cross, A440).^{**} Again, at

^{*} At the same time, Con Edison sent a telegram to TVA and to American Electric Power Company stating that the surcharges proposed by the AEC "are to be subject of discussions between us and AEC. We request that you do not accept any such inefficiency surcharge without our consent and that you refer them to us for advice." (DX-H-4, A2080). It should be noted that in this telegram, Con Edison did *not* refuse to pay the surcharge; moreover, the discussions that were taking place were concerned with the accuracy and accounting treatment of the surcharge rather than its propriety.

^{**} At an August 8, 1970 meeting of the Commissioners of the AEC, Quinn was directed to reopen negotiations with the recipients of the 450 MW release in order for the AEC to recover a surcharge for that power release (Quinn Direct, A112). On August 11, 1970, AEC officials at Oak Ridge were instructed to begin negotiations for the surcharge (PX-19, A1552); the negotiations to reopen the written contracts ultimately proved fruitless (Op., A45; Quinn Direct, A112-14).

this meeting, Con Edison did not state that it would refuse to pay the surcharge (Schwartz Cross, A1063-64; *see* Roddis Direct, A913).

Con Edison sought to make the surcharge a political issue. In addition to stating to Quinn on August 6 that this issue could be politically embarrassing to the AEC and the White House (*supra*, p. 23),* on August 19, 1970 Roddis went to the White House with a written objection to the surcharge (Roddis Direct, A915). Mr. Searle of OEP refused to discuss the matter and simply took the document (*Id.*, A917).** Roddis also went to the AEC and met with Commissioner Ramey who affirmed the Commission's position on the surcharge (*Id.*, A916). A number of letters from Luce and others objecting to the surcharge were also sent to the OEP (Quinn Redirect, A521). Nevertheless, neither the OEP nor the White House took any steps to intervene in the AEC's affairs (Quinn Redirect, A521)—in the case of Con Edison's August 19 letter, it was simply "forwarded by the White House to the AEC" (Br. 22).*** Indeed, the Office of Management and Budget contacted the AEC and advised it that the costs associated with the power reduction should be recovered to the extent possible (Quinn Redirect, A522).

Con Edison continued to assert that it would pay only a surcharge equivalent to what the recipients of the 450

* As the District Court found, the AEC did not perceive any political implications regarding the surcharge and continued to insist on its payment (Op., A44).

** At the trial, the District Court asked Roddis whether he told any Government official that Con Edison would stop taking the power if the Government insisted upon the surcharge; Roddis responded that he had not (*Id.*, A915).

*** These facts fully answer Con Edison's strained assertions throughout its brief that the AEC was somehow acting contrary to the policy contained in the May 5 statement by computing a surcharge and insisting on its payment.

MW power release had paid (Op., A45). At a meeting between Quinn and Luce on September 1, 1970, Luce stressed that he had stated this position in their July 24, 1970 telephone conversation (Luce Direct, A839). Luce confirmed, however, that Con Edison had requested the power from the AEC and he did not state that Con Edison intended to discontinue its receipt of the power even, as the District Court found, when Quinn informed him that Con Edison was under no obligation to continue receiving the 200 MW (Op., A45; Quinn Cross, A484-85). At the September 1, 1970 meeting the AEC agreed to consider the concept of an averaged surcharge by taking the 450 MW reduction into consideration (Op., A45; Schwartz Direct, A1023). Following the September 1, 1970 meeting, the AEC recalculated the surcharge* and offered, on several occasions to compromise the matter; Con Edison adhered to its intransigent position and refused to compromise (Op., A46; Br. 23).

By letter dated September 30, 1970 Luce informed the AEC that Con Edison would not pay the surcharge (PX-28, A165-68). On the next day, October 1, 1970, Con Edison released the 200 MW of power back to the TVA for return to the AEC (Op., Op., A46).**

The District Court perhaps best summarized the operative facts during the period from July 22 to October 1, 1970 which underly this litigation:

*The surcharge had been recalculated to reflect the return to the AEC of 350 of the prior 450 MW reduction as of August 30, 1970 (Op., A75, n.11).

** During the restoration of the 200 MW, TVA requested that it be allowed to retain 100 MW instead of fully restoring the power of AEC. The AEC agreed to this procedure in return for a 14% premium on the cost of the 100 MW. Quinn testified that this 14% premium is not comparable to the 200 MW surcharge, and the District Court so found in the absence of any contrary evidence from Con Edison (Op., A75 n.12).

Defendant never advised the AEC that it would refuse to pay a surcharge altogether until September 30, 1970, nor did Con Edison even state that it would stop accepting the power. It is clear from the record that during this period Con Edison knew that AEC was demanding compensation for its increased costs; indeed, it knew as early as August 6, 1970 only ten days after the power had begun to flow, the magnitude of the surcharge sought by AEC (Op., A46).

E. Con Edison's Power Costs in the Summer of 1970

As the District Court found, the price paid by Con Edison to the supplier utilities for the AEC power was comparable to Con Edison's own cost of generating power (Op., A41). Con Edison paid a total of \$2,485,321.77, or 7.85 mills PKH, for the AEC power received between July and October 1970 (*Id.*; PX-48-A, A1788).^{*} The cost to Con Edison during the summer of 1970 to produce its own electrical power ranged from 7.70 to 8.96 mills PKH (Op., A41; PX-48-B, p. 20^{**}).

In 1970, clearly in part as a result of the AEC's release to Con Edison of 200 MW, Con Edison increased its sales of electricity to residential customers by eleven percent; in fact, Con Edison increased its sales to all classifications of customers (PX-47; A1706). Although the testimony of Schwartz with respect to whether Con Edison realized a profit or loss on the sale of the 200 MW is evasive and contradictory—the District Court

^{*} This cost does not include the AEC surcharge.

^{**} This exhibit, Con Edison's answer dated January 29, 1976 to Plaintiff's Interrogatory No. 17, was received in evidence on May 6, 1977 (A971-73). It was not included as part of the Joint Appendix and a copy is submitted herewith as Addendum A.

characterized the evidence as "equivocal, to say the least" (Op., A74 n.7)—the evidence is clear that Con Edison received \$951,962,810 in gross revenues from the sale of electrical power in 1970, an \$89,840,116 increase over 1969 (PX-47, A1701). Moreover, Con Edison had a net income in 1970 of \$128,427,252 from all of its operations (PX-47, A1701).

Nonetheless Con Edison has argued that it did not recover the full cost of the 200 MW from its customers (Br. 25). Yet, the Court found that no such conclusion could be drawn from the record (Op., A74 n.7). More important, a review of the evidence demonstrates that Con Edison's assertion in this regard is based on incomplete and misleading information. As calculated by Con Edison, its average cost of generating power each month during the period July through September, 1970 was 7.7 mills PKH, 8.70 mills PKH, and 8.96 mills PKH, for each respective month (PX-48-B, Addendum A).^{*} During this time, because of the breakdown of "Big Allis", Con Edison was purchasing the AEC power, at least during August and September,^{**} at a price *below* Con Edison's average cost of generating power (7.85 mills compared to 8.70 and 8.96 mills)—which is the basis of its charge to customers (Hauspurg Direct, A949; Op., A1 and A74 n.7). Thus, Con Edison's assertion of a "loss" as a result of this power purchase is, at best, odd.^{***}

^{*} These figures are the expression in "mills" of the "cents" figures contained in PX-48-B.

^{**} With respect to July—during which Con Edison's average generating cost was lower than the cost of the AEC power—it must be remembered that Con Edison started purchasing AEC power on July 27, thus incurring this higher cost for only four days. In any event, the cost differential on those four days was only .15 mills PKH, or .0015 cents PKH.

^{***} It should also be noted that during the summer of 1970, Con Edison had a contract to purchase power from the Rochester Gas and Electric Company. The purchase price of that power was quite comparable to the cost of the AEC power—7.3 mills PKH (Hauspurg Recross, A 968; DX-K-8, A 2341)—and Con Edison has claimed no "loss" from that power.

Con Edison's only attempt to explain this "loss" was through Schwartz's testimony at trial. After listening to that testimony, and considering Con Edison's answer to the Government's prior interrogatory that "whether the 200 MW purchased by Con Edison . . . was sold to Con Edison's customers at a 'profit' or 'loss' and the magnitude of such 'profit' or 'loss' cannot be determined" (PX-48-A, A1790), the District Court rejected Schwartz's explanation of this issue (Op., A74 n.7).

More fundamentally, Con Edison profited substantially from the 200 MW purchase because, as the District Court found, it saved Con Edison from a major power disaster (Op., A60-61; *Id.*, A39-40). There simply was no other uninterrupted or supplemental power available to Con Edison during this more than two month period (Hauspurg Recross, A967-68) and, absent the 200 MW from the AEC, Con Edison would have had further voltage reductions and, probably, load shedding (*see supra*, pp. 20-21). Schwartz's testimony perhaps best demonstrates this aspect of the profit Con Edison derived from this power purchase:

I would not mean to indicate in any way that Con Edison would consider in determining whether to avail itself of [the 200 MW] whether or not it would make a profit or a loss on that.

Our obligations transcend these matters, and we would obtain power in an emergency as best we could to avoid the disruptions caused by power shortages. (Schwartz Direct, A989-90).

F. The AEC's Losses on the 200 MW Power Release

As the District Court found, the AEC clearly incurred a loss as a result of the 200 MW power release to Con Edison (Op., A41). The essence of this loss is that the AEC's production of SWUs at its gaseous diffusion facilities was reduced by 126,000 as a result of its release of

the 200 MW to Con Edison (Op., A47; Geller Cross, A1190). This loss in production, in turn, raised the cost of each SWU actually produced during this period (July 27 through September 30, 1970) because the AEC continued to incur substantial fixed costs in the operation of these facilities (Quinn Redirect, A515-16). The surcharge computed by the AEC was simply designed to compensate the AEC for these increased unit costs (*Id*; Op., A42).

As noted above, on July 28, 1970, the AEC calculated the surcharge to be 5.41 mills PKH (*See supra*, p. 22). This calculation was made by estimating the increased production costs incurred as a result of reducing the power consumption at the diffusion plants from 1,550 MW (the level of operation following the earlier 450 MW reduction) to 1,350 MW (*See* PX-13, A1544; Op., A42).

Prior to the trial, AEC calculated its actual costs resulting from the 200 MW reduction (Op., A47; Sullivan Direct, A558). This calculation (PX-41, A1590-1602) is based upon a unit cost approach (Op., A47; Geller Cross, A1188).^{*} Further, the surcharge calculation contained in PX-41 is based primarily on actual data (Op., A48; Sullivan Redirect, A643). In Earl Sullivan's opinion,^{**} which was accepted by the District Court, PX-41 is accurate to within one percent of reality (Op., A48; Sullivan Direct, A576).

^{*} The Energy Research and Development Administration ("ERDA"), the AEC's successor, presently employs this same approach in calculating the surcharge it routinely imposes whenever it reduces power at a utility (Op., A47; Sullivan Direct, A558). ERDA's present surcharge is a flat fee, recalculated on a semi-annual basis, which does not change depending upon the size of the power reduction (Op., A47; Sullivan Direct, A556-58). Since a surcharge which is currently applied is calculated on a prospective basis, it is based primarily on estimates (Op., A48; Sullivan Redirect, A643).

^{**} Earl Sullivan is Chief of the Energy Branch with ERDA.

PX-41 has established that by reason of the 200 MW release of power, the AEC produced 126,000 fewer SWUs, with a resulting increase in cost of \$1.9163 for each SWU actually produced during the relevant period. Multiplying the increased unit cost per SWU by 822,833, the number of SWUs actually produced, the AEC's total increased cost was \$1,575,795. This figure translates into a charge of approximately 4.79 mills PKH, somewhat lower than the 5.41 mills PKH initially estimated by the AEC (Op., A48; Sullivan Direct, A565-66).

The AEC incurred this increased cost per SWU because the fixed operating costs of the diffusion plants remain the same regardless of the level of production and power consumption (Scarborough Direct, A651-65; PX-41, Appendix 2, A1600).^{*} Similarly, the AEC incurred the same added factor costs despite the decreased production (Scarborough Direct, A659-65; PX-41, Appendix 3, A1601).^{**} As Eugene Schmidt, and ERDA auditor testified, the added costs calculated in PX-41 reflect economies of scale (Op., A49; Schmidt Direct, A774).

Despite strenuous efforts, Con Edison was simply unable to seriously challenge any of the factual bases of PX-41 (Op., A49). To the contrary, as the District Court concluded, Con Edison's own expert testimony provided fundamental support to the Government's claim that it had sustained a loss as a result of releasing the 200 MW for Con Edison's benefit:

^{*} Among the fixed operating costs are expenses relating to cascade operations, testing programs, uranium scrap recovery, power distribution, transportation and security (Op., A49; Scarborough Direct, A655-56 and Cross, A690-91).

^{**} Among the added factor costs are items such as expenses relating to start-up, shut-down and stand-by of the enrichment process, warehousing costs, costs relating to analysis of the enrichment product, as well as administrative and other costs (Op., A49; Scarborough, A659-61; PX-41, Appendix 3, A1601).

Dr. Geller conceded that even if [the AEC] was today awarded 1.4 or 1.5 million dollars, that amount of money would be inadequate to produce today the 126,000 SWUs which the AEC lost by reason of the 200 MW reduction [A1223]. This testimony lends more weight to [the AEC's] calculation than to any of those presented by the defendant (Op., A53).

ARGUMENT

At the outset, it should be noted that the foregoing statement of facts parallels the District Court's "Finding of Facts". Even though the District Court was not required to refer to each portion of the record supporting its findings, it is apparent that each material finding was amply supported by the entire record below. Moreover, the District Court, unlike defendant in its brief, relied upon both the salient documents and the live testimony of both parties' witnesses in making its findings.

In its decision, the Court rejected many of the factual assertions which have also been proffered by defendant in its brief here because of scarcity of the evidence to support the defendant's conclusions. For instance, the Court rejected the defendant's assertions, based upon a disconnected and random series of documents, that the White House abrogated the functions and duties of the AEC in the release of the 200 MW for Con Edison's benefit (Op., A27, A31-35). Further, the Court rejected the contentions of plaintiff that the prior reduction of power by the AEC and the subsequent reduction of power by the AEC were at all comparable to the 200 MW reduction (Op., A73 n.1, A75 n.12). In both instances, as in others, the Court's rejection was predicated upon testimony which established that such a comparison would be inappropriate.

On this appeal, Con Edison has nonetheless made a broad attack on the District Court's findings as to liability and damages. That attempt must be rejected. As this Court has recently stated in *SEC v. Parklane Hosiery Co.*, 558 F.2d 1083, 1086 (2d Cir. 1977), under Rule 52(a) of the Federal Rules of Civil Procedure,

The burden is on the defendants, as the party attacking the findings of fact, to show that the findings are clearly erroneous. *Hedger v. Reynolds*, 216 F.2d 202 (2d Cir. 1954). The Commission is entitled to the benefit of all reasonable inferences and to have the evidence viewed in the light most favorable to it. [citing cases]

See *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). *Rolf v. Blyth, Eastman, Dillon & Co.*, Dkt. No. 77-7104, slip op. 889, 896 (2d Cir., Jan. 3, 1978); *Van Alen v. Dominick & Dominick, Inc.*, 560 F.2d 547, 550 (2d Cir. 1977). Further, this Court has held that "it is clear that a trial court's findings as to damages are to be accorded just as much weight on review as other findings of fact." *Cunningham v. Rederiet Vindeggen A/S*, 333 F.2d 308 (2d Cir. 1964).

The District Court's findings of fact and conclusion of law finding liability and setting damages are fully supported by this record and should be affirmed.

POINT I

The District Court Was Correct In Granting Plaintiff Quasi-Contractual Relief Because It Fulfilled Defendant's Duty To Supply Electricity During An Emergency With Intent To Be Reimbursed For Its Resulting Costs.

The Government is entitled to quasi-contractual relief, based upon the emergency assistance doctrine stated in Sections 115 and 114 of the Restatement of Restitution,

for the losses it incurred in releasing power to Con Edison. Section 115 provides:

A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if

- (a) he acted unofficiously and with intent to charge therefor, and
- (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.

See Wyandotte Trans. Co. v. United States, 389 U.S. 191, 204 (1967); *United States v. Boyd*, 520 F.2d 642 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1975).

Section 114 provides:

A person who has performed the duty of another by supplying a third person with necessities, although acting without the other's knowledge or consent, is entitled to restitution from the other therefor if

- (a) he acted unofficially and with intent to charge therefor, and
- (b) the things or services supplied were immediately necessary to prevent serious bodily harm to or suffering by such person.

The doctrine of emergency assistance was most recently applied by this Court in *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830 (2d Cir.), *cert. denied*, 98 S.Ct. 183 (1977), a case very similar to the case at bar. There, a seaman on the vessel *Overseas Progress* had a heart attack but the vessel did not have adequate resources to meet the emergency and to fulfill its duty toward the seaman. Another vessel, the *Canberra*, responding to the *Overseas*

Progress' radio message for assistance, changed course, picked-up the seaman and took him to the nearest shore hospital. 553 F.2d at 832-33. Prior to taking the seaman on board, the captain of the *Canberra* notified the captain of the *Overseas Progress* that the owner of his vessel might look to the owner of the *Overseas Progress* for reimbursement of the *Canberra's* costs associated with its emergency assistance; the captain of the *Overseas Progress* did not in any way indicate that such compensation would be refused. *Id.* at 833.

The owner of the *Canberra* subsequently tendered a bill for \$12,108.95 representing the costs it incurred in rendering assistance to the *Oveseas Progress*. The owners of the *Overseas Progress* refused payment, except for \$248, and a lawsuit followed for the balance. The District Court granted summary judgment to the defendant shipowner on the ground that the law of admiralty barred recovery for "pure life salvage". *Id.* at 833. This Court reversed, applying quasi-contract principles and the doctrine of emergency assistance.

In reversing the District Court, Judge Kaufman clearly indicated that the Court was applying a land-based principle of equity to a maritime situation. *Id.* at 834-36. Since the *Overseas Progress* had requested assistance, the Court concluded that it was liable for reimbursement of the *Canberra's* costs, "regardless of the value of the benefit actually conferred." *Id.* at 836. See *Id.* at 835 n.5.

The doctrine of emergency assistance is equally applicable in the present case. As Luce testified, the failure of the Ravenswood generator had created the most serious emergency Con Edison had faced in his ten years at Con Edison and the lost power had to be replaced as soon as possible (*supra*, pp. 10-11). Con Edison was, thus, unable to perform its duty of service to its customers, thereby creating an emergency which endangered the

health and safety of those customers. Plaintiff, at the request of Con Edison, performed this duty by reducing its power consumption and modifying its power contracts in order to release power to Con Edison. It did so with the express intent to be reimbursed, having notified Con Edison of this intent on July 24, 1970, before Con Edison began to receive the 200 MW.*

Con Edison nonetheless argues that the doctrine of emergency assistance does not apply here since it did not have an absolute duty to provide electricity and since the power crisis was not the type of emergency envisioned under the emergency assistance doctrine (Br. 57). The District Court properly rejected this argument (Op. A63). Charles Luce testified that Con Edison is held responsible for providing electricity to New York (Luce Cross, A853); Bertram Schwartz, while refusing to admit a legal duty, conceded that Con Edison was under a duty to make best efforts to provide power (Schwartz Direct, A995). Indeed, Schwartz testified that Con Edison's obligations to find and provide power during that emergency would "transcend" whether it would make a profit or sustain a loss on the power purchase (*Id.*, A990).

Con Edison seeks to distinguish between its "legal" duty to provide power and some other unspecified, absolute duty (Br. 58-59). In making this argument, Con Edison concedes that it has a "legal" duty which requires it to supply electricity to its customers and to provide reasonable service to them. N.Y. Transp. Corp. Law § 12

* While Con Edison attempts throughout its brief to qualify the July 24, 1970 conversation on the basis of Luce's statement that Con Edison would pay what the recipients of the 450 MW reduction paid, it is clear from the record, and the District Court so found, that Quinn told Luce that the 200 MW was not comparable to the 450 MW release and would be more expensive than the 450 MW release. Luce confirmed this aspect of the conversation throughout his testimony (*See supra*, pp. 17-19).

(McKinney 1976-77 Pkt. Pt.); N.Y. Pub. Serv. Law § 65 (McKinney 1955) (Br. 58).^{*} Suffice it to say, the few New York Court decisions interpreting these provisions are consistent with the District Court's finding that Con Edison "is held responsible for providing electricity to New York", *Manley v. Con Edison*, 187 Misc. 366, 63 N.Y.S. 2d 353 (Sup. Ct., Queens Cty. 1946); *Danna v. Con Edison*, 71 Misc. 2d 1029, 337 N.Y.S.2d 722 (Civ. Ct., Queens Cty. 1972); *Esposito v. Con Edison Co. of N.Y.*, 68 N.Y.S.2d 868 (Bronx Mun. Ct., 1947); and that Con Edison "was under a duty to make best efforts to provide power." *Park Abbott Realty Co. v. Iroquois Natural Gas Co.*, 102 Misc. 26, 168 N.Y.S. 673 (Sup. Ct., App. Erie Cty. 1918).

Con Edison next argues that it could not be responsible for interruption of electrical service unless the interruption resulted from gross negligence (Br. 58). This argument simply misses the point. In the spring of 1970, Con Edison knew that one generator was out and a second defective generator was obviously unreliable (*supra*, pp. 9-10). It therefore made arrangements to get as much supplemental power as possible (Luce Cross, A844). When Big Allis failed and had to be shut down, Con Edison was clearly left without sufficient reserves for the peak demands of the summer (Luce Cross, A843). In the exercise of its reasonable discretion—with full knowledge of a potential major crisis and its duty to its customers—Con Edison elected to accept the AEC's power and avert a crisis and, again, knowing that the AEC expected to be compensated for its costs in rendering such assistance. As the Court did in *Peninsular & Oriental*, this Court should reject the defendant's argu-

^{*} Contrary to defendant's assertion at page 57 of its brief the District Court did not find that Con Edison had an "unqualified" duty but merely rejected Con Edison's argument that it had "no legal duty" to supply power (Op., A 63), a point Con Edison apparently concedes in its brief.

ment that the AEC's assistance did not constitute part of the duty that Con Edison owed to its customers. 553 F.2d at 835. Having demonstrated by its conduct that receipt of the 200 MW was perceived by Con Edison to be part of its duty "to make every effort to supply the power" *Park Abbott Realty Co. v. Iroquois Natural Gas Co.*, *supra*, Con Edison should be precluded from now arguing otherwise.*

Con Edison's contention that the Court did not find, and that the Government has made no showing, that Con Edison could not fulfill its duty to supply power (Br. 59-60) ignores the extensive record and the findings of fact. It is beyond peradventure that Con Edison did not have sufficient reserves to meet its peak demand (Luce Direct, A850). The record demonstrates, and the District Court found, that Con Edison had exhausted its traditional sources of supplemental power (Op., A30). Moreover, Luce, Hausperg, and Chambers testified that Con Edison actively explored re-activation of an obsolete, expensive TVA steam generation system (Chambers Cross, A396-400; *supra*, p. 16 n.*).** And finally,

* Con Edison's reference to exemption 13 of its rate schedule is also misplaced (Br. 58, 59). If Con Edison had interrupted the supply of electricity, it would plainly not have been a result of "causes beyond his control or through the ordinary negligence of its employees . . ." It would have been a deliberate interruption predicated upon the decision of its top management. Such a decision not to accept the power could only have been made upon the basis of whether Con Edison would have made a profit or a loss during the emergency—which by Schwartz's testimony would have violated Con Edison's obligations to its customers (Schwartz Direct, A 990).

** It must be noted in this connection that at least some of this desperate exploration was being conducted when Con Edison believed that the problems in transmitting the power from the AEC were insurmountable (Op, A31-38; Roddis Direct, A899-900; *See supra* pp. 16-18).

the record is clear, and the Court found, that notwithstanding the 200 MW, Con Edison effected voltage reductions during a substantial number of days, and load shedding on another (Op., A39-40; PX-48-B, A1795-96). It is also clear that without the 200 MW the voltage reductions would have been far greater and the load shedding would have increased (Op., A40). Further, the District Court rejected similar arguments posited by defendants at the conclusion of trial.

Indeed, if Con Edison had no duty to its customers, and if the situation were not an emergency, then Con Edison simply could have disconnected customers. Instead, in three days of frenzied activity by its highest officers, Con Edison sought out all possible sources of power and accepted 200 MW from the federal government in the face of AEC's clear indication that the AEC would seek recovery of its costs. Had the matter not been a true emergency to public welfare and safety, Con Edison could have simply "shed load". Thus, the Court finds the arguments presented on behalf of defendant to be at odds with the actions of its officers during the time at issue (Op., A40-41).

Con Edison devotes five pages of its brief to distinguish this Court's decision in *Peninsular & Oriental, supra*.^{*} That discussion is based on a strained and narrow misreading of this Court's holding in *Peninsular & Oriental*. The District Court's decision succinctly dis-

^{*} For instance, contrary to Con Edison's assertions (Br. 49-50), the District Court, adhering to the principles in *Peninsular v. Oriental*, did not state a hard and fast rule with respect to measure of damages, but rather stated that it is not uncommon for Courts to measure damages by reference to the value of services rendered or plaintiff's costs incurred (Op., A67). Con Edison's assertion to the contrary is particularly misleading since the Court held exactly that which defendant states it did not.

posed of two of defendant's efforts to distinguish the *Peninsular* case:

The Court also rejects defendant's argument that the *Peninsular & Oriental* decision was one limited to the "highly specialized field of admiralty." (Deft. Memo at 6). While Judge Kaufman's opinion opens on a maritime note, it is clear that the Circuit Court was applying a land-based equitable principle to a maritime context in the face of an ancient maritime doctrine which barred recovery for "life salvage". Finally, defendant argues that the plaintiff, rather than Con Edison, initiated the plan to deliver the power to defendant. Again, the evidence is to the contrary; Con Edison requested the power from the AEC in the face of Quinn's statement that the AEC would seek to recover its costs. Indeed, Luce conceded at the September 1, 1970 meeting that Con Edison had requested the power (Op., A64).

Defendant also argues that unlike the situation in *Peninsular & Oriental*, it was unaware of the costs involved in the 200 MW reduction by the AEC prior to the reduction (Br. 50-51). This argument flies in the face of the District Court's finding that after consulting with the AEC Chambers passed along to Luce the information that the cost to Con Edison could amount to between 12 and 14 mills PKH (Op., A32-33).^{*} Indeed, it is in this context that on July 24 Luce expressed to Quinn Con Edison's "willingness to pay" by stating that

^{*} The Court specifically found that Chamber's recollection of the second July 23 conversation with Luce in which he informed him that the cost would be in the neighborhood of 12 to 14 mills PKH was more accurate than that of Luce (Op., A73 n.3). The finding was predicated, in part, upon the fact that Chambers was disinterested.

it would pay what the other recipients had paid.* The 7.85 mills PKH paid by Con Edison to the suppliers of the power together with the 5.41 mills PKH original estimation of the surcharge was within the price range quoted by Chambers to Luce. Consequently, contrary to defendant's assertion, Con Edison, in accordance with the findings of the District Court and the weight of the evidence, did know the magnitude of the costs involved in the power reduction and was in no different position from that of the defendant in *Peninsular & Oriental*

Con Edison also urges that *Peninsular & Overseas* does not apply because it was unaware of the type of costs associated with the power reduction. This alleged lack of knowledge is also contrary to the evidence in the record. Luce testified that he fully understood the increased production cost concept to which Quinn had referred on July 24 and that he would expect the AEC to incur the kinds of costs involved in the surcharge (Luce Cross, A870, A878). Moreover, Luce stated that the underlying concept of the surcharge was not uncommon (Luce Direct, A831), and Roddis testified that Con Edison had similar transactions with upstate producers (Roddis Cross, A921-26).**

* Further, although Luce did not know that the recipients of the prior 450 MW reduction had not paid a surcharge, he had been advised that the cost of the reduction for Con Edison's benefit would be higher than the previous reduction (Op., A38). Thus, Luce could not have reasonably assumed that the surcharge to Con Edison would be the same as that charged to the prior recipients (Op., A57).

** Defendant also contends that the 10% surcharge which it pays for supplemental power to other utilities pursuant to its power pool agreements is the proper measure of the market value of plaintiff's assistance. Simply, this argument ignores the fact that the 10% is being paid by one utility to another for power. It was not designed to compensate a producer for the relinquishment of contractual rights which reduced its production.

Finally, Con Edison asserts (Br. 52) that the *Peninsular & Oriental* rule was designed to encourage seamen to perform their "moral obligation" to save imperiled lives of other seamen. This narrow interpretation is contrary to the plain import of this Court's findings and Section 114 and 115 of the Restatement. The rule was clearly designed to encourage assistance in emergency circumstances in fulfilling "moral" and "legal" obligations when inaction would endanger the public welfare and safety. As this Court noted in *Peninsular & Oriental*:

. . . there is a class of cases where it is imperative that a duty be performed swiftly and efficiently for the protection of the public or an innocent third party, in which a "good Samaritan" who voluntarily intervenes to perform the duty may receive restitution for his services. This rule has become crystallized in the doctrine that performance of another's duty to a third person, if rendered by one qualified to provide such services with intent to charge for them, is a ground for recovery in quasi-contract. This principle is limited to cases where the services are immediately necessary to prevent injury or suffering. *Greenspan v. Slate*, 97 A.2d 390, 397 (N.J. 1953) (Vanderbilt, C.J.); Restatement of Restitution § 114. Cf. *Wyandotte Trans. Co. v. United States*, 389 U.S. 191, 204 (1967).

Thus, the AEC's actions in swiftly responding to an obvious emergency for the protection of the public by relinquishing its rights to the 200 MW, while expressing its intent to be reimbursed for its cost (Quinn Cross, A457), represents ample grounds for recovery in quasi-contract.

A. Absent An Emergency of the Nature Present In Case Plaintiff Would be Entitled to Recovery in Quasi-Contract

Even if there had not been an emergency, plaintiff would be entitled to recover in quasi-contract because defendant was unjustly enriched by knowingly accepting the benefits of plaintiff's non-gratuitous actions without paying for them. See, e.g., *Williston, Contracts*, § 534 (3rd ed.). The District Court enunciated the proper standards in determining the applicability of the doctrine of quasi-contract in this case:

In order to prevail on its fourth claim for relief, plaintiff must demonstrate that it rendered a service to the defendant under circumstances where the defendant had reason to understand that the service was for Con Edison's benefit and that it was not rendered gratuitously. Plaintiff must also show that the defendant was unjustly enriched by reason of plaintiff's services. See *Bloomgarden v. Coyer*, 479 F.2d 201, 208-211 (D.C. Cir. 1973); *Bradkin v. Levertov*, 26 N.Y.2d 192, 257 N.E.2d 643, 309 N.Y.S.2d 192 (1970) (Op., A59).

It is undisputed that Con Edison knew that the services were not gratuitous and that they were to be rendered for its benefit. At this point in Con Edison's history, it should be obvious that averting a major power shortage represents a substantial benefit, amounting to unjust enrichment absent compensation. The District Court's remarks in this latter respect are again appropriate:

Charles Luce's testimony makes clear that Con Edison regarded the Ravenswood crisis as a most serious emergency. He testified that the 200 MW had a beneficial impact upon Con Edison's goodwill and upon the value of its securities. There can

be little doubt that the actions of the plaintiff saved Con Edison from a major power disaster. That Con Edison might not have made money on the resale of the power does not mean that it did not benefit by the release. The Court also rejects Con Edison's argument that it paid the fair market value for the 200 MW. The evidence makes abundantly clear that Con Edison could find no other source to provide the 200 MW. As this Court observed in its decision denying summary judgment, the cost of production and transmission can hardly be equated to the fair market value of 200 MW in a market where there are no such amounts of electricity available for long-term purchase. Thus, although the enrichment here is not of the type usually presented, the Court concludes without difficulty that Con Edison was benefitted by the release of the 200 MW (Op., A60-61).

Con Edison argues that, based upon Section 352 of the Restatement of Contracts, the Government is not entitled to any relief because it continued to release power in the face of Con Edison's alleged repudiation of the contract (Br. 55). The law is clear, however, that where the breaching party, as Con Edison here, continues to accept the benefits of performance it cannot be heard to claim repudiation. Indeed, continued acceptance of the benefits of continued performance manifests acquiescence to the terms of the agreement. See comments to § 352 of the Restatement of Contracts; *Brennan v. National Equitable Investment Co.*, 247 N.Y. 486 (1928); *Tibbetts Constr. Corp. v. O & E Constr. Co.*, 15 N.Y.2d 324 (1965); *In re Meiselman*, 105 F.2d 995 (2d Cir. 1939).

As the New York Court of Appeals said in *Tibbetts*:

'The assertion of a repudiation of its contract is nullified by a subsequent acceptance of benefits growing out of the contract.' [15 N.Y. 2d at 338]

Similarly in *Brennan* the Court said:

The rule is thoroughly established that an assertion of a rescission is nullified by the subsequent acceptance of benefits growing out of a contract claimed to have been rescinded . . . He cannot by words cancel his contract and then continue to assert rights and benefits under it. [247 N.Y. at 489]

Thus, defendant was unjustly enriched precisely because, as the District Court found (Op., A60), it never repudiated the arrangement between the parties. Rather it continued to accept performance by the plaintiff and enjoy the benefits of such performance even though it could have, at any time, stopped taking the 200 MW which have been returned to the AEC. It accepted the power in the face of a continuing demand for payment. By its conduct, defendant was unjustly enriched and plaintiff is entitled to quasi-contractual relief.

Nor can defendant argue that it continually repudiated the agreement (Br. 55-56). Contrary to defendant strenuous assertion, Luce specifically stated that Con Edison never informed the AEC that it would not pay the surcharge (Luce Direct, A833). Under questioning by the Court, Roddis testified that Schwartz was not instructed to inform the AEC that it would not pay the surcharge (Roddis Direct, A913). Further, Roddis stated that when he went to Washington to protest the surcharge he did not even suggest that Con Edison would not pay the surcharge (Roddis Direct, A915). On the contrary, Con Edison's major concern throughout the early period was not in the fact of the surcharge but rather the accuracy of the calculation and devising a method whereby its customers could be required to bear the burden of the charge (Op., A45; Roddis Direct, A910; Quinn Direct, A108-10, and Cross, A438-39).

B. Not Imposing a Surcharge on the 450 MW Reduction is Irrelevant to a Determination of Defendant's Liability

The emergency assistance doctrine enunciated in the Restatement of Restitution as well as Section 352 of the Restatement of Contracts fully answers Con Edison's argument that this Court must take into account the fact that the AEC did not receive a surcharge for the 450 MW Power reduction. As demonstrated below, that fact is simply irrelevant to the question of Con Edison's liability.

First, under the emergency assistance doctrine of the Restatement of Restitution and *Peninsular & Oriental, supra*, the Government is entitled to relief even if Con Edison, from the very outset, stated that it would not pay anything. As provided in Sections 114 and 115 of the Restatement of Restitution, a person performing another's duty in an emergency is entitled to restitution even if he acted "without the other's knowledge or consent." There is nothing in the Restatement or in *Peninsular & Oriental* to suggest that the AEC, having once not received a surcharge for its reduction in power, is thereafter foreclosed from seeking a surcharge for its assistance in all future situations. Indeed, as the District Court concluded "A person who once renders assistance gratuitously is not forever barred from seeking compensation for its costs when it again renders assistance." (Op., A65). The thrust of Sections 114 and 115 and *Peninsular & Oriental* is that the acting party have an intent to charge. Given such an intent—which was clearly expressed and acknowledged here—the Government is entitled to quasi-contractual relief irrespective of whether a surcharge had previously been collected.

Section 352 of the Restatement of Contracts also illustrates the irrelevance of not asking for a surcharge

from the 450 MW recipients. Assuming *arguendo* Con Edison's version of the events, under the doctrine of repudiation, once it knew that the recipients of the 450 MW had not paid a surcharge and that the AEC expected Con Edison to pay, defendant was under an obligation to cease accepting the benefits of plaintiff's actions if it did not intend to pay for them. (*See supra*, pp. 43-45). In short, by continuing to accept the power, Con Edison agreed to pay the surcharge.

Thus, the fact that the 450 MW recipients paid nothing loses any conceivable relevance, since Con Edison retained and continued to accept the benefits of the AEC's actions, knowing full well that the AEC did not intend those benefits to be gratuitous. Con Edison has been unjustly enriched and this Court must, therefore, affirm the District Court's finding that the Government is entitled to relief in quasi-contract.

POINT II

The Doctrine of Equitable Estoppel Requires Con Edison to Pay the Costs Associated with the Reduction.

The doctrine of equitable estoppel forecloses Con Edison from invoking the statute of frauds as a defense in this action and from not reimbursing the Government for the costs and losses associated with the 200 MW power reduction. The fundamental parameters of the doctrine are succinctly described in 3 *Willston, Contracts* § 692, pp. 791-96 (3rd ed. 1972):

"... he who by his language or conduct leads another to do, upon the faith of an oral agreement, what he would not otherwise have done, and changes his position to his prejudice, will not be allowed to subject such person to loss or injury, or

to avail himself of that change to the prejudice of such other party." (Footnote omitted)

The testimony and documents in the record amply support the District Court's finding that Con Edison is estopped from denying the existence of a contract with the AEC. The essential elements of this claim of equitable estoppel are, change in position by the AEC and detriment to the AEC. See *Dickerson v. Colgrove*, 100 U.S. 578, 580-81 (1880); *The Savage is Loose Co. v. United Artists Theatre Circuit, Inc.*, 413 F. Supp. 555, 559 (S.D.N.Y. 1976); 3 *Williston, Contracts* § 692 (3d ed. 1972) (Op., A55).

In *Dickerson v. Colgrave*, *supra*, 100 U.S. at 580-81, the Supreme Court long ago set forth the well established principals of equitable estoppel which are applicable to this case:

"The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statute cannot be invoked." *Id.*

Cf. Dunphy v. Ryan, 116 U.S. 491 (1883).

Con Edison argues that there can be no estoppel since it never represented that it would pay AEC costs as assessed by the AEC. However, the District Court found (Op., A57) and the evidence establishes, that Con Edison did agree to pay costs as assessed by the AEC. In the July 24, 1970 conversation, Quinn informed Luce that the AEC was in the process of calculating the surcharge amount. Even if Con Edison were under the mistaken impression that the recipients of the 450 MW had paid a twenty percent charge, Con Edison never confirmed that figure with the AEC.* Indeed, the District Court rejected the notion that Luce and Quinn agreed that Con Edison would pay only what the prior recipients paid, since the District Court found that in the July 24 conversation Quinn explained to Luce that the 200 MW reduction would be more expensive than the 450 MW reduction (Op., A37). The Court found support for its finding in the fact that Luce was told that the AEC was calculating the surcharge, and that Luce was, therefore, on notice that the amount could turn out to be different from any previous charge (Op., A57; *see supra*, pp. 18-19). Con Edison's acceptance of the power under these circumstances, without seeking confirmation of its cost, constituted a representation to the plaintiff that Con Edison would, indeed, pay the costs as calculated by the AEC.

Therefore, Con Edison's actions clearly led to plaintiff's release of the 200 MW (Op., A57-58). As the circumstances plainly demonstrate, AEC acted reasonably in releasing the power on July 27, 1970 in reliance upon the July 24 oral agreement. The power crisis was very

* Con Edison's failure to inquire further is particularly odd since at that time Chambers had informed Luce on July 23, 1970, that the total cost of the power to Con Edison might be in the neighborhood of 12 to 14 mills PKH, including a surcharge of 3 to 7 mills PKH (Op. A33; *see supra* p. 16).

real and time was of the essence (Quinn Cross, A457-58). Each of the contacts between the parties indicated to the AEC that Con Edison was primarily concerned with obtaining the power and having it transmitted to New York. The AEC informed Con Edison that it expected Con Edison to pay the costs incurred by the AEC resulting from the release of the power, and that if Con Edison wanted the power, it should deal through the supplier utilities to make the final arrangements (Luce Cross, A821).^{*} Con Edison subsequently made arrangements with the supplier utilities and on July 27, 1970, the AEC released the power (PX-25, A1558). As the District Court found (Op., A58), given the sequence of events, plaintiff's response was reasonable under the emergency conditions which prevailed. See *Twentieth-Century Fox Film Corp. v. National Publishers, Inc.*, 294 F. Supp. 10, 12 (S.D.N.Y. 1968).

Nor was the AEC's reliance rendered unreasonable by its failure to terminate the power release upon Con Edison's objection to the 5.41 mills surcharge. Con Edison needed the power for the remainder of the summer. Further, Con Edison never stated that it would refuse to pay altogether; nor did it ever seek to return the power (Op., A58). Indeed, at the September 1, 1970, meeting, George Quinn reminded Luce that Con Edison was free to return the power. Con Edison elected to go forward. Throughout August and September Con Edison continued to accept the benefits of the power while the AEC discussed the matter with Con Edison and labored away at recalculating the surcharge to arrive at a settlement figure (Op., A43-46; *See supra*, pp. 23-27). It was not until September 30, when Con Edison ceased taking the 200 MW, that the AEC was, in effect, informed by Luce that

^{*} See Luce's handwritten notes of the July 24, 1970 conversation in which the noted "Price [undecipherable] production losses...deal thru K's..." (PX-49, A1804).

Con Edison would not pay any surcharge and that a settlement could not be arrived at (Quinn Direct, A149). Thus, the Court rejected Con Edison's argument that the AEC is estopped from suit on this claim, concluding that "it is apparent that the AEC continued to permit the power reduction in reasonable reliance upon Con Edison's conduct" (Op., A58).

The fact of injury to the AEC from this reliance can not seriously be challenged. The Government's proof on this issue was clear, (*See supra*, pp. 29-32); in addition, Con Edison's own expert witness conceded that the 200 MW reduction resulted in some loss to the AEC (Op., A58-59). The power release precluded the AEC from producing 126,000 SWUs. Under any fair review of the evidence, detrimental reliance is present. See *Freedman v. The Concordia Star*, 250 F.2d 867 (2d Cir. 1958).

Moreover, defendant's continued acceptance of the 200 MW after August 6, 1970 is clearly sufficient under the doctrine of "equitable estoppel" to foreclose it from invoking the protection of the statute of frauds and to require it to pay plaintiff's costs, the underlying basis of which was communicated to Con Edison during the first two weeks of the power reduction. *Oxley v. Ralston Purina Co.*, 349 F.2d 328 (6th Cir. 1965); *Crossman v. Fontainebleau Hotel Corp.*, 273 F.2d 720 (5th Cir. 1959); *Hicks v. Simmons*, 271 F.2d 875 (10th Cir. 1959); *Paramount Pictures Corp. v. William Holden*, 166 F. Supp. 684 (S.D. Cal. 1958); *Metal Products Corp. v. April*, 251 N.Y. 146 (1929); *Rosenbaum-Grinnell Inc. v. Bart Swartz International Textiles Ltd.*, 15 Misc. 2d 450, 182 N.Y.S. 2d 441 (Sup. Ct. N.Y. Cty. 1958); *Ant v. The Drug Products Co. Inc.*, 7 Misc. 2d 471 (Sup. Ct. N.Y. Cty. 1957).

The District Court's finding best summarize the effect of this conduct:

"It is apparent that in the course of the July 24, 1970 conversation, Luce expected that Con Edison would have to make some payment to the AEC. Defendant's change of position ignores the agreement to reimburse plaintiff. Thus . . . Con Edison's . . . conduct was such that it is now estopped from raising the bar of the Statute of Frauds. *Oxley v. Ralston Purina Co.*, 349 F.2d 328, 336 (6th Cir. 1965)" (Op., A56).

POINT III

Con Edison's Claim of a Denial of Equal Protection Is Meritless.

Defendant constructs an elaborate equal protection argument to support its claim of unlawful discrimination (Br. 62-71). This argument ignores the most fundamental element of a Fifth Amendment claim of equal protection. It is axiomatic that the due process clause of the Fifth Amendment is not applicable to Government action which is not arbitrary and unreasonable. Under due process and equal protection analysis, strict scrutiny of a Government action is required only when the activity impermissibly interferes with the exercise of a fundamental right, such as a right of a uniquely private nature, *Roe v. Wade*, 410 U.S. 113 (1973), the right of interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969), or First Amendment rights, *Williams v. Rhodes*, 393 U.S. 23 (1968), or when a classification operates to the peculiar disadvantage of a suspect class, such as a classification by race, *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964), alienage, *Graham v. Richardson*, 403 U.S. 365 (1971), or ancestry, *Oyama v. California*, 332 U.S. 633 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944). In a case such as this, where no fundamental right is at stake:

"[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy." *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

See also *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159-60 (1930).

In the instant case defendant has not illustrated that the AEC's decision to impose a charge on reductions in power after the 450 MW reduction interfered with any of its rights or was arbitrary or unreasonable. Indeed, the Government has established that once the AEC determined that prolonged reductions in its power had a substantial effect upon its production a determination was made to impose a surcharge. There was nothing arbitrary or unreasonable about the AEC's actions. They were intended to promote a legitimate end of the AEC, i.e., preventing production losses while providing assistance to a public utility. See, *Flemming v. Nestor*, 363 U.S. 603 (1960); *United States v. Kras*, 409 U.S. 434, 446 (1973).

Moreover, it is a long established principal that benefits conferred by the Federal Government gratuitously do not create vested rights and may be modified or withdrawn at any time. *United States v. Teller*, 107 U.S. 64, 68 (1883). *Frisbie v. United States*, 157 U.S. 160 (1895); *Monaco v. United States*, 523 F.2d 935, 939 (9th Cir. 1976); *DeRodulfa v. United States*, 461 F.2d 1240, 1258 (D.C. Cir. 1972). Hence, the AEC had the right to modify its prior policy and adopt a surcharge for further reductions in power, simply because the prior policy

did not create vested rights of which the defendant may avail itself.*

Apart from the fundamental substantive deficiencies of defendants argument, is the fact that the argument was never raised in the District Court and, thus, should not be considered by this Court. *American Air Export & Import Co. v. O'Neill*, 221 F.2d 829 (D.C. Cir. 1954). Had plaintiff been appraised sufficiently in advance of trial that this was to be a critical legal issue, it is at least possible that additional evidence could have been introduced to support its position. It is essential "... that parties may have the opportunity to offer all the evidence they believe relevant to the issue..." *Singleton v. Wulff*, 428 U.S. 106 (1976) quoting with approval *Hormel v. Helvering*, 312 U.S. 552 (1941). Indeed, this Court can not hold a trial court to be in error in failing to decide an issue not put before it. *Brown v. Rudberg*, 171 F.2d 831 (D.C. Cir. 1948).

* The record clearly establishes that the AEC only intended to relinquish 450 MW under the policy expressed in the May 5 statement, and that when Con Edison requested assistance, the AEC had already released that amount; the 200 MW release to Con Edison was, thus, in addition to the AEC's expressed commitment under the May 5 statement. Moreover, statements of Government policy do not create private contractual or vested rights. *Gilbert v. United States*, 75 U.S. 358 (1869); *Parish v. United States*, 75 U.S. 489, 490 (1869); *Reconstruction Finance Corp. v. MacArthur Mining Co.*, 184 F.2d 913 (8th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951).

POINT IV

The Appropriate Measure of Damages is the Actual Increased Costs and Losses Suffered as a Result of Plaintiff Reducing its Power Consumption by 200 MW.

The measure of damages in the present case, under either equitable estoppel or quasi-contract principles, is the actual increased costs and losses the AEC incurred as a result of reducing its power consumption by 200 MW. The fact that plaintiff would be entitled to the same relief under any theory, including the contract theory which the Court dismissed, is predicated upon the AEC's manifest intention, at the outset of the transaction, to be made whole. *United States v. Brotherton*, 106 F. Supp. 353 (S.D.N.Y. 1952); *Williston, supra*, §§ 1458, 1459. Moreover, under an estoppel theory defendant would be obligated to pay the increased costs and losses resulting from the 200 MW reduction, since that was the essence of the contract.

As to the measure of damages in quasi-contract, defendant incorrectly concludes that, as a matter of law, plaintiff is only entitled to the value of the benefit received by the defendant and not the value of the loss suffered by plaintiff. Defendant fails to note that, where the circumstances merit, in quasi-contract cases courts measure relief by the value of that which has been rendered by plaintiff rather than the value of the benefit actually realized by defendant. In this particular action the appropriate measure of damages is unquestionably the reasonable value of the AEC reduction in power consumption by 200 MW resulting from the relinquishment of its contract rights. *Peninsular & Oriental Co. v. Overseas Oil Carriers, supra*, 553 F.2d at 836-37.

Damages must be determined here in light of the loss to plaintiff for three reasons. First, as this Court

held in *Peninsular & Oriental*, *supra*, 553 F.2d at 836, a plaintiff who renders assistance in an emergency is entitled to the reasonable value of his services "regardless of the benefit actually conferred." See also, e.g., *Cotnam v. Wisdom*, 104 S.W. 164 (Sup. Ct. Ark. 1907). Second, the District Court held that plaintiff transferred its contract rights to 200 MW to defendant.* In cases of transfer of a property right, the measure of damage is the reasonable value of the property conveyed and not the benefit realized by defendant as a result of obtaining such property. *Mathews v. Continental Roll & Steel Foundry Co.*, 121 F.2d 594 (3d Cir. 1941); *Williston, Contracts* § 1458, p. 68 (3d ed. 1972). Finally, even in cases involving services and not personal property, where the benefit to defendant cannot be precisely measured, which is certainly true in this action, then the value of the services performed is the measure of damages. *Campbell v. Tennessee Valley Authority*, 421 F.2d 293 (5th Cir. 1969).

The appropriate measure of reasonable value of the services here must be the actual costs and losses suffered as a result of the AEC's actions in assisting Con Edison. In some cases the measure of reasonable value is market value; however, there is no readily ascertainable market for the transfer of contract rights to power and, even if there were, no one would be expected to sell such rights without receiving at least his costs. More important, given an emergency, such as the one here, actual costs and not market price is the test because of the *sui generis* nature of the circumstances. As this Court stated in *Peninsular & Oriental*, where it awarded actual costs:

In many circumstances, reasonable value may be determined by the market price for obtaining comparable services. But here the CANBERRA's assistance was *sui generis*, since no other vessel

* We submit that this conclusion was incorrect, see *infra*, pp. 66-79.

could have reached Turpin as swiftly, and thus, none could have provided comparable medical care to a man in his critical condition. Under these circumstances, the only possible measure of 'reasonable value' is the reasonable expense incurred by CANBERRA as a result of her assistance to Turpin . . . (553 F.2d at 836)

In light of *Peninsular & Oriental*, the reasonable value of plaintiff reducing its power consumption by 200 MW should be measured in terms of the actual costs and losses resulting from the 200 MW reduction. The evidence before the Court with respect to plaintiff's *actual costs* and *losses* resulting from the 200 MW reduction is contained in Plaintiff's Exhibit 41 (A1590-1602) which, undisputedly, is based upon plaintiff's actual business records for the relevant time period. The actual value of the costs and losses incurred, as reflected in the Exhibit, and accepted by the District Court, is \$1,576,795.

A. PX-41 Is The Measure of Damages

Con Edison urges that the District Court erred in awarding plaintiff damages because PX-41, the summary of the calculations of the AEC losses resulting from the 200 MW reduction, did not accurately reflect the costs incurred.* Defendant makes several arguments to support this contention.

* Defendant's argument that PX-41 was improperly admitted into evidence over its objections is misplaced (Br. 87-88). Sullivan, through whom the exhibit was introduced, testified that he had participated, along with Walter Scarbrough, who testified on the exhibit, in the preparation of the exhibit. Moreover, the Court recognized that the exhibit was properly admissible under Rule 1006 of the Federal Rules of Evidence, which clearly provides that summaries or calculations of voluminous writings are

[Footnote continued on following page]

First, Con Edison argues that because there were other approaches to the calculation of the losses incurred by the AEC the calculations in PX-41 were incorrect. Sullivan * testified that the document was comprised of 93 percent actual cost data and seven percent estimates (estimated for four days in July and one day in October 1970) (Sullivan Redirect, A642-43). He also stated that the calculations which are contained in PX-41 were within plus or minus one percent of accuracy (Sullivan Direct, A576; Op., A48).* As the District Court con-

admissible into evidence (Sullivan Direct, A561). As the comment to the Rule indicates:

"The admission of summaries of voluminous books, records, or documents offers the only practical means of making their contents available to judge and jury... 4 Wigmore § 1230"

Contrary to the impression that defendant attempts to create in its brief, it had ample opportunity to cross-examine the witnesses who prepared PX-41 and it had the underlying documentation for PX-41; nevertheless it never, during the course of trial, attempted to use the documents to test the accuracy of the exhibit (Geller Cross, A1186, 1196-97).

* Earl Sullivan an electrical engineer by training, has been employed by the AEC and its successor, since 1957; he is presently Chief of the Power Branch, responsible for purchasing \$600 million annually in power for the three gaseous diffusion facilities (Sullivan Direct, A538, 540). He participated in the original design and engineering of electrical distribution systems for the gaseous diffusion facilities and had responsibility for the original studies on generation and transmission (*Id.*, A539). He testified that over his twenty years with ERDA he has made calculations and supervised calculations concerning the estimation of power costs and utilization of power to assure efficiency (*Id.*, A541).

* During the course of trial defendant never raised an objection to PX-41 on the basis of surprise. Nor could they, for defendant had the underlying material for PX-41 in advance of trial. Moreover, defendant always knew the basis of the calculation in PX-41 and could, and did examine witnesses, including Sullivan, prior to trial. In fact Sullivan was deposed on the very calculations contained in PX-41.

cluded, "[d]espite hours devoted to cross-examination of plaintiff's witnesses on PX-41, the defendant did not seriously challenge any of the factual bases of PX-41" (Op., A49). The propriety of the analysis in PX-41 cannot therefore be doubted.

Con Edison also claims that the "passing-on" defense which has been rejected in most anti-trust cases is applicable to the facts in this case. In support of its argument, defendant cites *Hanover Shoe, Inc. v. United Shoe Machinery*, 392 U.S. 481 (1968), the seminal case in the anti-trust area for rejection of the theory. At page 83 of its brief, defendant points to language in the decision (392 U.S. at 494) which may be viewed as something of an exception to the otherwise proscriptive import of the case. A cursory analysis of the *Hanover Shoe* decision serves, however, to illustrate that the Court's proscriptive pronouncements apply to the present case rather than the exception which defendant urges.

In rejecting the "passing-on" concept the Court in *Hanover Shoe* analysed the effect of illegal conduct which might bring about the assertion of "passing-on" defense; that discussion is enlightening for several reasons. First, the Court held that the fact that a buyer raises his prices ("passing-on") as a result of illegal conduct of the seller does not foreclose him from recovering damages:

We hold that the buyer is equally entitled to damages if he raises his prices for his own product. (392 U.S. at 489).

The Court went on to state that "at whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his cost lower." *Id.* at 489. Surely, in the present case, where the AEC was only interested in equalizing its costs over the years for the benefit of its purchasers the result should be no different. Con Edison should not be permitted to benefit from the losses of the AEC and its purchasers.

The Court in *Hanover Shoe* was essentially stating that the law is not interested in the injured party's prices and profits, but in making the injured party whole. In this connection, the Court cited to a number of cases in which the fact "that plaintiffs had recouped the overcharges from their customers was held irrelevant in assessing damages." 392 U.S. at 490 n.5. The Court in *Hanover Shoe* was not impressed with the kind of argument that defendants are making in the present case, because a wider range of variables influence a company's pricing. As the Court pointed out, it is impossible, in the real world, to determine the effect of prices on sales:

"Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. 392 U.S. at 493.

As to the exception in *Hanover Shoe* noted by Con Edison, it is simply inapposite. The Court was referring to circumstances in which all of the above considerations would not be present; namely, where, unlike the case at bar, the plaintiff is guaranteed purchases regardless of price and the effect of the overcharge is determined in advance. In *Illinois Brick Co. v. Illinois*, 45 U.S.L.W. 4611, 4615 (U.S., June 9, 1977), the Court commented on the exception in *Hanover* stating:

"In such a situation, the purchaser is insulated from any decrease in its sales as a result of

attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance without reference to the interaction of supply and demand that complicated the determination in the general case.

Clearly, the primary purpose of the legislation limiting the AEC's price was to keep the costs of production as low as possible and encourage demand. The AEC, consistent with sound practice, anticipated demand; however, there is absolutely no evidence in this case that it had *pre-existing* cost-plus contracts, which guaranteed demand. Nor can Con Edison show that the AEC sales did not suffer as a result of its increased costs. In short, it is impossible to determine the precise effect that the losses resulting from the reduction had upon the demand for the AEC's services, notwithstanding a statute which requires the AEC to, at some point, recover its costs.*

Defendant also cites a very old Court of Claims case, *Plimpton Manufacturing Co. v. United States*, 15 Ct. Cl. 14 (1897), in support of the proposition that to the extent the Government was required to receive its costs it is not entitled to recover losses sustained as a result of Con Edison's breach (Br. 81-82). The defendant's reliance upon this case is completely misplaced. In *Plimpton*, the Postmaster General had a contract with A to manufacture envelopes. At the expiration of the contract he made a contract with B for the same service. The Postmaster was required by statute to sell the envelopes to the public, as nearly as possible, at cost. A's envelopes cost more to manufacture than B's and therefore were being sold at a higher price. B was delayed in commencing manufacture; however, A continued to manufacture envelopes during B's

* Indeed, all fairly well run businesses attempt to recover costs; that the AEC was limited to those costs should not be an indicia of "pre-existing" costs plus contracts. *Hanover Shoe, supra*, 392 U.S. at 489.

delay. The Postmaster sued B for the additional cost paid to A for the manufacture of orders not filled by B during this period. The Court found that the Postmaster had never required B to fill the orders that A was filling and that since the old price schedule was in effect for the orders manufactured by A the Postmaster could not demonstrate losses occasioned by B's delay. Thus, contrary to defendant's assertions, *Plimpton* does not establish a hard and fast principal that a statutory provision requiring costs prohibits recovery where a genuine loss can be demonstrated. Indeed, in the present case plaintiff firmly established its loss and should therefore be entitled to recovery.

As the District Court noted, if defendants argument were to prevail, parties contracting with the Government and non-profit organizations could breach their contracts with impunity (Op., A67). And as the Court pointed out in *Hanover Shoe, supra*, the plaintiff's sales are irrelevant to the defendants wrongful conduct. Finally, the evidence is clear that the AEC is required by statute to equalize its costs and any recovery here, as Mr. Schmidt testified, would have to be utilized for that end (Schmidt Direct, A715-16).

B. The 15% Contingency Factor Did Not Include Extraordinary Losses Incurred by the AEC Such as Those Resulting From the 200 MW Release

Defendant contends, throughout it's brief, that a 15% contingency factor encompassed the additional production costs occasioned by the 200 MW reduction. The Court's finding and the testimonial evidence is to the contrary. Quinn specifically stated that the contingency factor did not contemplate loss production resulting from reduced power (Quinn Recross, A526-28):

I do not believe that it was intended to cover production interruptions. I think the primary

purpose, as I recall was to provide for some degree of escalation of costs without requiring a frequent change in charge (*Id.*, A526).

This testimony, which was accepted by the District Court (Op., A51), finds further support in the fact that the AEC did not realize the full effect on production of such prolonged reductions in power until after the 450 MW reduction (Op., A29). Obviously, the contingency factor could not have been designed prior to 1970 to compensate for that kind of circumstance. Moreover, the evidence clearly establishes, that notwithstanding the contingency factor, the AEC has subsequently designed and imposed a standard surcharge along the same basis as that employed in PX-41 for all reductions after 1970 (Op., A47; Sullivan Direct, A556-58).

Defendant's reference to the testimony of Eugene Schmidt, a management auditor with ERDA, and Dr. Geller is misleading. Schmidt simply agreed on cross examination that the contingency factor included items such as "unforeseen costs and production interruptions, uncertainty of future costs of money and similar uncertainties and unforeseen events" (Schmidt Cross, A733). Suffice to say, Schmidt was not asked whether the contingency factor was intended to cover the losses from a production interruption as broad in scope and as long in duration as that resulting from the 200 MW reduction. Likewise, Dr. Geller admittedly had no experience in calculating a surcharge (Geller Direct, A1031-59), and judging from his testimony was an analytical mathematician by training (*Id.*, A1037) and experience (*Id.*, A1037-59).^{*} When asked on direct examination whether the losses from the 200 MW reduction were included in

^{*} Dr. Geller testified that he had no knowledge of accounting in general and the AEC cost accounting specifically (*Id.*, A1210, A1237).

the 15% contingency factor Dr. Geller stated honestly, "I think so" (Geller Direct, A1137); he clearly was not certain.

In contrast to that testimony, as the District Court found, "George Quinn testified that this contingency factor does not cover the extraordinary type of losses which occurred here; the Court finds Quinn's testimony on this point more authoritative and more persuasive." (Op., A51). The District Court judgment on this matter and reliance on Quinn's testimony, was not "clearly erroneous" and therefore should not be disturbed on review. *Rolf v. Blyth, Eastman, Dillon & Co.*, Dkt. No. 77-7104, slip op. 889, 896 (2d Cir., Jan. 3, 1978); *Van Alen v. Dominick & Dominick, Inc.*, 560 F.2d 547, 550 (2d Cir. 1977).

C. The District Court Properly Rejected Defendant's Calculations

Plaintiff's calculation of damages, PX-41, was carefully explained in some 180 pages of testimony by three witnesses, all of whom were qualified to testify on the calculation. Defendant was unable, during its cross-examination of plaintiff's witnesses, to raise any serious question with respect to PX-41 (Op., A49). Moreover, defendant did not even use the underlying actual cost data, upon which PX-41 is predicated, to determine the accuracy of the calculation (Geller Cross, A1186, 1196-97). Defendant's own expert testified that in today's market \$1.5 million could not purchase the 126,000 SWUs that were lost in 1970 (Geller Cross, A1213; Op., A53). Thus, the record overwhelming supports the Court's finding that the exhibit was an accurate calculation of the AEC's losses in 1970.

Defendant has nonetheless offered several alternative methods to calculate the AEC losses (Br. 90-99). Dr. Geller, defendant's expert responsible for these calcula-

tions, suggested the most sound reason for rejecting each of them. The calculations which he made and which defendant has offered are comprised entirely of estimates based upon certain projections or PX-41 and Dr. Geller did not elect to use the actual cost data for the period of the reduction (Geller Cross, A1186-87, 1196-97). Moreover, at least some of Dr. Geller's calculations were predicated upon the assumption that the case was being tried and decided before the end of 1970, when the actual cost would not have been available (Geller Cross, A1196).

Dr. Geller's "threshold method" was predicated upon the assumption that if one pays twenty-five cents for a widget today, and tomorrow buys it for thirty cents, essentially he is only spending five cents on the second day (Geller Cross, A1202). This approach is, at best, highly theoretical in the real world. Dr. Geller's "average surcharge" approach is also admittedly theoretical and bears very little relationship to the calculations the AEC presently uses to determine the surcharge, although it was intended to (Geller cross, A1207). Dr. Geller merely constructed a model of what he thought must be the average surcharge method (Geller Cross, A1204-07). He went on to acknowledge that PX-41 was dependant upon actual cost while his calculation was based upon estimates (*Id.*, A1208). He also stated that he was not surprised that the actual costs incurred were significantly higher than his calculation (Geller Cross, A1192-94).

Dr. Geller's "power efficiency losses" approach merely analyzes the \$1,576,795 million loss contained in PX-41 and determines the loss of efficiency of power as a result of the 200 MW reduction (*Id.*, A1211-13, A1215). It does not undermine PX-41, it simply suggests that an additional \$125,092 should have been charged (*Id.*, A1213). Cross-examination of Dr. Geller on this point confirmed this conclusion:

"Q. So there would be not only a loss with respect to the added factor and [sic] fixed operat-

ing costs but there would also be a loss in decrease power is that correct?

A. Decreased effectiveness of the power." (*Id.*, A1213).

Thus, the District Court's rejection of the defendant's calculations and the express finding that PX-41 is conclusive on the evidence should be affirmed.

POINT V

The District Court Erred in Dismissing the Contract Claim on the Basis of the Statute of Frauds.

A. The Facts Do Not Support The Court's Determination

During the course of trial, the District Court dismissed plaintiff's contract claim on the basis of the statute of frauds embodied in the Uniform Commercial Code, Section 1-206. In so doing, the Court found that the AEC's relinquishment of the 200 MW was the transfer of a contract right and not a relinquishment of the right for the benefit of Con Edison (A796-97).

Section 1-206 is not applicable in the present case because it only applies to the sale of personal property which did not occur here. It provides as follows:

(1) Except in the cases described in subsection (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies that subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

(2) Subsection (1) of this section does not apply to contracts for the sale of goods (Section 2-201) nor of securities (Section 8-319) nor to security agreements (Section 9-203).

"Sale" is defined in § 2-106 as ". . . the passing of title from the seller to the buyer for a price." In the present action, the AEC did not sell anything to Con Edison because no title passed to Con Edison. The AEC and Con Edison simply agreed that the AEC would relinquish its contract rights to power from TVA and OVEC. This did not give Con Edison the right to demand the power from TVA or OVEC. In fact, the AEC's contracts with TVA and OVEC did not provide for any assignment of AEC's contract right to power to anyone else (Quinn Direct, A94). Rather, the agreement between the AEC and Con Edison simply gave Con Edison the opportunity to acquire the right or title to the power by entering into a separate purchase agreement with TVA or OVEC (Quinn Direct, A94-99).

If plaintiff could not assign its contract right to power, then there was *no* contract right that plaintiff could possibly have transferred to defendant. Thus plaintiff respectfully submits that the Court was under a factual misapprehension when it found that plaintiff transferred a contract right to the defendant.*

Moreover, there is no authority for the proposition that an agreement to relinquish a contract right constitutes a sale as required by § 1-206. The most analogous situation can be found in the comments to § 199 of the Restatement of Contracts, which deals with con-

* The Court's reliance on language in the contract modifications and letters indicating that the power was to be released to Con Edison was clearly not binding on the suppliers who could invoke the non-assignment clause at will to supercede any such general descriptive language (See PX-15-17, A1546-52).

tracts for the sale of goods and the statute of frauds. That Section provides that a contract for relinquishment of a claim or a right is not within the statute of frauds as shown by example six thereto:

"A is in possession of goods of the value of \$1,000, which B and C each asserts belong to him. B orally promises C to forbear to assert his claim in consideration of C's promise to pay B \$100."

The statute of frauds would not be applicable because B did not transfer a right or claim to C. B only promised to forbear or relinquish his claim. When B forebore, C had no right to the goods in A's possession. C had to bargain or deal with A. In short, B sold nothing to C. The situation is precisely the same here. The United States sold nothing to Con Edison; it merely agreed to relinquish its contract rights to power so that Con Edison, like C, could bargain with another.

Professor Corbin also concludes that an agreement to relinquish a contract right is not a sale and therefore not within the statute of frauds. He notes:

In order to fall within the statute [of frauds], the agreement must be for the sale of the chose in action; this means that it must be an agreement for the transfer (the assignment) of the existing right from one party to the other. *An agreement not to enforce such a right or for its extinguishment and discharge, is not an agreement for its sale and is not within the statute.* [2 Corbin, *Contracts* § 478, p. 633 (emphasis added)].*

* This quote from Corbin again makes the important and related point that for there to be a sale of a chose-in-action, there must be an assignment of one party's right to another. As Quinn stated, plaintiff's contracts with TVA and OVEC prevented plaintiff from assigning its contract rights to power to anyone else (Quinn Direct, A94). Thus, plaintiff had no chose-in-action to sell to defendant.

There are three classifications of cases that demonstrate that a contract for relinquishment of a contract right does not fall within the parameters of the statute of frauds contained in § 1-206. First, a settlement in which a party agrees to surrender his claim to goods is not a sale and therefore is not barred by the statute of frauds. *Bender's U.C.C. Service, Duesenberg & King, Sales & Bulk Transfers*, § 2.02[1], pp. 2-15 and 2-16; *Hurricane Steel Industries Co. v. Maurice Pincoffs Co.*, 464 S.W. 2d 387 (Tex. App. 1971). In such a case, as is true in the present action, there is no sale because nothing is transferred.

For the same reason, rescission of a contract which is still executory, is not within the statute of frauds because no rights have been transferred, instead there is merely a release of a promissory obligation. As noted in *Duesenberg & King*:

As a practical matter, however, rescission takes place generally while an agreement is executory, and as a result is almost never within the statute [of frauds]. As such, at the time of rescission, there is merely a release of a promissory obligation. *If A promises to sell goods to B, and later A and B mutually agree to call off the deal, nothing is at the time of rescission transferred from B to A, and consequently the deal is not within the statute of frauds because it is not a contract for the sale of goods [Bender's U.C.C. Service, Duesenberg & King, Sales & Bulk Transfers, § 2.02[5], pp. 2-37 (emphasis added)]*.

Finally, one can easily characterize plaintiff's actions in the present case as the performance of a service for Con Edison. It is well established that a contract for services is not a sale under the U.C.C. inasmuch as there is no passing of title from the seller to the buyer. *North American Leisure Corp. v. A & B Duplicators, Ltd.*,

468 F.2d 695 (2d Cir. 1972) (NAL provided master tape to A & B which made cassettes to be sold by NAL. The Court held that there was no sales contract but rather a contract for services.); *DeMatteo v. White*, 336 A. 2d 355 (Pa. Sup. Ct., 1975) (Oral contract to construct a house is a contract for services and not a sale); *Mueller & Sons, Inc. v. Northern Ill. Gas Co.*, 299 N.E. 2d 601 (Ill. App. 1973) (Oral contract to "install, service and maintain vending machines on the premises of defendant" was not barred by U.C.C. statute of frauds because there was no passing of title to anything); *Friend v. Columbus Hospital*, 18 U.C.C. Rep. 78 (Sup. Ct. N.Y. Cty. 1975) (Furnishing of blood is not a sale where plaintiff primarily bargained for the services of the medical staff and facilities of the hospital).*

In sum, § 1-206 is only applicable to the *sale* of personal property. A transfer of title is essential to a sale and an agreement to merely relinquish a contract right does not, and, in fact, cannot involve the required transfer of title. Thus, in the present action, plaintiff agreed with Con Edison to relinquish its contract right to power from TVA and OVEC. It did not assign or transfer or pass its right to such power to Con Edison. Neither did it assign or transfer or pass its right to anything else

* See also *Billy Rose's Diamond Horseshoe, Inc. v. United States*, 448 F.2d 549 (2d Cir. 1971) where the Court held that a release of a contract right was not a sale under § 453 of the Internal Revenue Code. The Court reasoned that there was no sale because no rights were transferred. It stated:

The transaction involved here was not a sale or other disposition of personal property as those terms are used in Section 453. This Court has long held that cancellation or release of a contract right does not transfer the rights to the transferee-payor and thus is not a sale (448 F.2d at 551).

But see also *Sirbo Holdings Inc. v. Commissioner of Internal Revenue*, 476 F.2d 981 (2d Cir. 1973), 509 F.2d 1220 (2d Cir. 1975).

to Con Edison. It merely rendered a service to Con Edison which enabled Con Edison to enter into a separate and totally independent contract with TVA and OVEC for the actual power. This Court should therefore reverse the District Court's decision insofar as it denies plaintiff relief in contract.

B. The Statute Of Frauds Does Not Apply To The United States

Apart from the District Court's misapprehension of the facts, the Court failed to note that federal substantive law, and not local law, applies where the United States is suing based on actions involving the Government in its constitutional capacity. Thus, contracts of the Federal Government are governed, not by the particular laws of the states where they are made or performed, but by a uniform federal law. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *National Metropolitan Bank v. United States*, 323 U.S. 454 (1945); *Keydata Corp. v. United States*, 504 F.2d 1115 (Ct. Cl. 1974); 1A *Moore, Federal Practice* § 0.321. For example, state statutes of limitations are inapplicable to the United States. *Chesapeake & Del. Canal Co. v. United States*, 250 U.S. 123, 125 (1919); *United States v. Summerlin*, 310 U.S. 414 (1940); *United States v. Podell*, Dkt. No. 77-6107, slip op., p. 4 n. 7 (2d Cir., Feb. 6, 1978). Similarly, state statutes of fraud are inapplicable to the United States. *Penn-Ohio Steel Corp. v. United States*, 354 F.2d 254 (Ct. Cl. 1965).

In the absence of an applicable federal statute, the court must fashion the governing federal rule of law. In so doing, the court must decide whether to select local law as the appropriate federal common law or to fashion a different federal policy. *United States v. 93,970 Acres of Land*, 360 U.S. 328, 333 (1959); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592 (1973).

The Supreme Court has repeatedly held that federal courts must not automatically apply state law, but rather must deal "independently, whenever necessary and appropriate, with essentially federal matters." *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947). In exercising this power, a federal policy, local law should be either adopted or disregarded as the federal rule of law to be applied. See *United States v. Brosnan*, 363 U.S. 237, 240 (1960).

A federal interest exists which necessitates the application of federal law whenever the United States has acted within its constitutional powers. In particular, a federal interest exists whenever the United States or any agency of the United States in the performance of its functions enters into a contract with a private entity. *United States v. Allegheny County*, 322 U.S. 174, 183 (1944); *United States v. 93.970 Acres, supra*; *United States v. Eastern Airlines, Inc.*, 366 F.2d 316 (2d Cir. 1966); *United States v. L.N. White & Co.*, 359 F.2d 703 (2d Cir. 1966); *Cargill, Inc. v. Commodity Credit Corp.*, 275 F.2d 745 (2d Cir. 1960); 1A Moore, *Federal Practice* § 0.321.

As the Supreme Court said in *United States v. Allegheny County, supra*, 322 U.S. at 183:

. . . The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law, not controlled by the law of any State.

In the present action, the United States claims that there was a contract between it and defendant, Con Edison. There can be, therefore, no question that a federal interest exists in the present action and that

federal law applies. Conversely, there can be no question that state law does not automatically apply.

C. Applicable Federal Law

As the Supreme Court said in *Clearfield Trust*, federal courts can only create federal common law in the absence of an applicable statute:

The duties imposed upon the United States and the rights acquired by it . . . find their roots in the same federal sources . . . *In the absence of an applicable Act of Congress* it is for the federal courts to fashion the governing rule of law according to their own standards. . . . In our choice of applicable federal law we have occasionally selected state law. [318 U.S. at 366-367 (emphasis added)].

In the present case, there is an applicable federal statute and therefore there is no reason for this Court to fashion a federal common law statute of frauds or to look to state law as the source of such federal common law. The statute is 31 U.S.C. § 200(a) which provides:

After August 26, 1954 no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—

(1) a binding agreement in writing between the parties thereto, including Government agencies in a manner and form and for a purpose of authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed;

- (2) a valid loan agreement, showing the amount of the loan to be made and the terms of repayment thereof; or
- (3) an order required by law to be placed with a Government agency; or
- (4) an order issued pursuant to a law authorizing purchases without advertising when necessitated by public exigency or for perishable subsistence supplies or within specific monetary limitations; or
- (5) a grant or subsidy payable (i) from appropriations made for payment of or contributions toward, sums required to be paid in specific amounts fixed by law or in accord with formulae prescribed by law, or (ii) pursuant to agreement authorized by, or plans approved in accord with and authorized by law; or
- (6) a liability which may result from pending litigation brought under authority of law; or
- (7) employment or services of persons or expenses of travel in accord with law, and services performed by public utilities; or
- (8) any other legal liability of the United States against an appropriation or fund legally available therefor.

In *United States v. American Renaissance Lines, Inc.*, 494 F.2d 1059 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974) this statute was held to be a statute of frauds and oral contracts covered by the statute would not be enforceable. As the court stated:

We hold that the statute does establish a requirement that government contracts of this type be in writing, and that contracts which are merely oral are not enforceable. We agree with the Govern-

ment that this statute does not follow the typical statute of frauds format. But we do not believe that to be determinative. Rather, we feel that the Congress was concerned that the executive might avoid spending restrictions by asserting oral contracts, and so enacted the requirement of a writing. (494 F.2d at 1062)

Thus, Congress has enacted an applicable statute, determining when a contract with the United States must be in writing. It would therefore be inappropriate for a court to fashion a different rule of federal common law.

Moreover, this statute does not bar the United States' claim in the present action. The only portion which is conceivably relevant here is § 200(a)(1). However, by its very language, it only acts as a bar where the United States may be obligated to pay money for goods, services or real estate the United States receives. It does not bar claims based upon oral contracts where the United States is the one that has performed the action in expectation of payment, as is the case here. In short, this statute is not applicable here because Con Edison did not deliver any goods to the United States, did not sell or lease to the United States any real property and did not perform any work or service for the United States.*

* It must also be noted here that the application of § 1-206 by the District Court raises serious public policy questions. First, a court should not apply the UCC as the federal common law where to do so would not protect the federal right. *United States v. Philadelphia National Bank*, 304 F. Supp. 955 (E.D. Pa. 1969). It is undisputed in this action that the United States was responding to an emergency situation where immediate action was required (Quinn Cross, A457-58). It came to the assistance of the citizens serviced by Con Edison and in doing so it performed a uniquely governmental function. If § 1-206 is applicable to such an emergency situation, then this could im-

[Footnote continued on following page]

D. The Terms Of The Contract Between Con Edison And The AEC Are Not Indefinite.

Defendant argues that no contract arose out of the July 24th conversation between Quinn and Luce and the subsequent request for power by Con Edison because the terms of contract were too indefinite since no specific amount for the surcharge was agreed to (Br. 35-40). This argument, like defendant's others, is not in harmony with either the facts or the applicable law.

Each case where alleged uncertainty is claimed must stand on its own peculiar facts and circumstances. *Mason v. Rose*, 85 F. Supp. 300 (S.D.N.Y. 1948), *aff'd*, 176 F.2d 486 (2d Cir. 1949); *Benham v. World Airways, Inc.*, 296 F. Supp. 813 (D. Hawaii 1969). It is not necessary that a specific price term be included in order for a contract to be enforceable. *Beech Aircraft Corp. v. Ross*, 155 F.2d 615 (10th Cir. 1946). It is sufficient if the price fixed by something other than the promise's future will. *Moon Motor Car Co. of N.Y. v. Moon Motor Car Co., Inc.*, 29 F.2d 3 (2d Cir. 1928); 1 *Corbin, Contracts*, § 97.

pede the public interest because it would cause possibly harmful delay by requiring the Government to first enter into a written contract before it could provide necessary emergency assistance. *Cf., Peninsular & Oriental Co. v. Overseas Oil Carriers, supra*, 553 F.2d at 836.

A second and related point is that the UCC was intended to apply to commercial transactions. UCC § 1-102. Here, the United States was not seeking to make a profit, to advance a security interest, or to do any of the other things associated with commercial transactions. Rather, it was acting in a non-commercial Governmental capacity of assisting citizens in need while protecting itself from consequential damages which in fairness should have been paid by Con Ed which had the original duty to supply the power. Surely, this is not the type of situation to which the UCC was ever intended to apply.

Furthermore, where the parties themselves have manifested an intent to make a contract, a court should not frustrate this intention by holding that a gap in one of the terms of the otherwise binding agreement renders the contract too vague and indefinite to enforce. *Sonnenblick-Goldman Corp. v. Murphy*, 420 F.2d 1169, 1173 (7th Cir. 1970); 1 *Corbin, Contracts*, §§ 95 and 97.

As stated in *Corbin*:

If the parties provide a practicable, objective method for determining [the] price or compensation, not leaving it to the future will of the parties themselves, there is no such indefiniteness or uncertainty as will prevent the agreement from being an enforceable contract. The same is true if they agree upon payment of a 'reasonable' price or compensation. There are many cases, however, in which it is clear that the parties have not agreed upon a 'reasonable price', and also have not prescribed a practicable method of determination. Where this is true, the agreement is too indefinite and uncertain for enforcement. The Court should be slow to come to this conclusion if it is convinced that the parties themselves meant to make a 'contract' and to bind themselves to render a future performance. Many gaps in terms can be filled, and should be, with a result that is consistent with what the parties said and that is more just to both than would be a refusal of enforcement. *Corbin, supra*, pp. 424-26.

Performance is a significant factor in determining the intention of the parties and the definiteness required for an enforceable contract. *Pillois v. Billingsley*, 179 F.2d 205 (2d Cir. 1950); 1 *Corbin, Contracts*, § 95.

In the present case, Luce testified that he believed Con Edison had entered into a contract after the July 24th conversation and Con Edison's request on July 25th for the 200 MW, even though the precise amount of the surcharge had not yet been calculated (Luce Cross, A862). Quinn told Luce that the costs to Con Edison would be higher than the 450 MW reduction, since the incremental losses were greater (Op., A37). Luce did not care about the actual amount of the surcharge and intended to enter into a contract to reimburse the AEC for its costs without these costs being first determined.

That this was Luce's intent is also illustrated by the fact that after the July 24th conversation, Con Edison had no further contact with the AEC until August 6th, 12 days after the July 24th conversation and ten days after it began to receive the power on July 27th. On August 6th, Roddis, then President of Con Edison, called Quinn to question the amount of the surcharge which the AEC sought. He did not question that Con Edison was obligated to reimburse the AEC for its costs and, in fact, he discussed alternative methods of paying the surcharge the AEC sought (*See supra*, pp. 23-25).

Moreover, the fact that the precise amount of the surcharge was not mentioned or agreed upon on July 24th does not make the contract unenforceable as defendant claims. What the parties agreed to was that Con Edison would reimburse the AEC for the costs incurred in reducing its power consumption by 200 MW. The payment of the AEC's costs is a standard which is independent of the parties' will and is therefore definite enough to permit enforcement.

Finally, it must be remembered that the contract was arrived at during an emergency when prompt action was required. Plaintiff was requested to release the power as soon as possible or else there might have been serious

consequences to the persons dependent upon Con Edison for electrical power. There was no time to be wasted in this situation (Quinn Cross, A457-58). The AEC fully performed on its promise, and under the conditions, the only fair and just result is to hold Con Edison to its bargain and not frustrate the intention of the parties by imposing any unintended requirements.

CONCLUSION

For the foregoing reasons the District Court's decision should be affirmed.

Dated: New York, New York
February 6, 1978

Respectfully submitted,

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Southern District of New York,
Attorney for the United States
of America.*

GARY G. COOPER,
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ADDENDUM

ADDENDUM A

17. State the average cost to Con Edison of producing one KWH of electrical power, the average cost of delivering such power to its customers and the average price paid for such power during the following periods of time:

- i. July 1, 1970, through July 25, 1970;
- ii. July 26, 1970, through August 31, 1970;
- iii. September 1, 1970, through October 1, 1970.

Answer:

On information and belief:

The data requested is compiled on a monthly basis and is not available for the specific intervals set forth in subparagraphs (i)-(iii). The available data on a monthly basis for July, August, and September 1970 is as follows:

<i>Average Cost * to Produce one KWH by Con Edison</i>	<i>Average Cost ** to Deliver Power to Customer</i>	<i>Average Price *** Paid</i>
<i>¢/KWH</i>	<i>¢/KWH</i>	<i>¢/KWH</i>
July	0.770	2.82
August	0.870	2.77
September	0.896	2.97

* The figure includes Fuel, Operating Labor, Maintenance, Station Supplies and Expenses and does not include any carrying costs associated with fixed investment.

** The figure takes into account Transmission and Distribution System Losses but does not include any carrying costs associated with fixed investment.

*** Average cost to Con Edison customer excluding sales tax.



AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the

14th day of February 1978 ^{two copies} she served/~~a copy~~ of the
within Brief for Plaintiff-Appellee

by placing the same in a properly postpaid franked envelope addressed:

Shearman & Sterling, Esquires
53 Wall Street
New York, New York 10005

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

14th day of February, 1978

Pauline P. Troia
PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978

Marion F. Bryant

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